

Alberta Construction

Labour Legislation Review

Prepared for the Government of Alberta

Andrew C.L. Sims, Q.C.

Submitted November 6th, 2013

Alberta Construction Labour Legislation Review
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November 6th, 2013

The Honourable Thomas Lukaszuk
Deputy Premier
Executive Branch
408 Legislature Building
10800 - 97 Avenue
Edmonton, AB T5K 2B6

The Honourable David Hancock, Q.C.
Minister of Human Services
Office of the Minister
224 Legislature Building
10800 - 97 Avenue
Edmonton, AB T5K 2B6

Dear Deputy Premier Lukaszuk and Minister Hancock:

Re: Construction Legislation Review

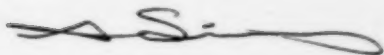
I enclose my report to Government following the review of Alberta's Construction Industry Labour Legislation.

Consensus has been sought throughout this review. To the extent it has emerged, it is indicated in the body of this report. Where it did not emerge, in accordance with my mandate for this review, I have made recommendations based on the input received and the exercise of my own experience, knowledge and judgment.

I wish to publicly thank all those who provided submissions, information and insights during the process and also to acknowledge the cooperation and assistance provided by the staff of the Labour Relations Board and the Department of Human Services.

Thank you for entrusting me with this task and for your courtesies throughout.

Yours very truly,



ANDREW C.L. SIMS, Q.C.



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Chapter 1 Introduction

This review is about Alberta's labour legislation for the construction industry. Building on the earlier, less formal "Hope-Chomyn" consultation, and the issues it found warranted further review, the Alberta government commissioned this process:

Scope

The Construction Labour Relations Review builds upon earlier consultation with stakeholders in Alberta's construction industry. This review will focus on legislation affecting construction employers, unions and tradespersons. It is not intended to open up for debate broader Labour Relations Code issues in other industries. Topics to be considered include:

- Appropriate provisions to govern labour relations for major projects of the type currently encompassed by Division 8, Part III of the Labour Relations Code.
- The system for certification and related processes for bargaining units in construction and related industries. It will include appropriate bargaining unit configurations and the protections and procedures necessary to ensure the certification and bargaining system provides an appropriate balance for employees, unions and employers within and outside the scope of registration.
- The Construction Registration system and how it co-exists with those parties outside of the registration system.
- The elements of Alberta legislation that may affect the competitiveness of Alberta's construction industry, with a view to maintaining and improving Alberta's preeminent position as a supplier of construction services with a stable construction labour relations environment.

Legislative choices require an understanding of the complexity of construction in Alberta. It is an industry too easily thought of in simple familiar terms: as a local contractor working with a group of tradespersons to build a home, a school, or an apartment building. It is that, but it is far more. Construction in Alberta involves building and maintaining some of the largest industrial projects in the world; many tied to the oil resources of Northeastern Alberta. It involves building power plants and our

electrical grid. It involves laying the vast network of pipelines that take our resources to market. It involves building our highways and the high-rises that are at the center of our fast growing urban cores.

Construction labour relations have always had unique features. Unlike most, construction workforces rise and fall as each project moves from site clearance to final commissioning. Different trades appear on site at different times. Construction contracts, mostly awarded through competitive bidding, involve the interests of owners as well as contractors. Wages are a large part of construction costs, but it is the efficiency, reliability, safety and productivity of that labour that is particularly important.

Construction workers have traditionally been trained and hired on the basis of specific qualifications and skills. It is still a craft based industry. Journeyman certificates are granted to pipefitters, boilermakers, or bricklayers, not to generic "construction workers". Trades training programs, apprenticeship rules, and some of our occupational health and safety legislation invoke these same craft divisions. Tradespersons have historically joined craft based trade unions, which have provided work through hiring halls. These unions provide long-term benefits like pensions and insurance that survive the tradesperson's many moves from employer to employer and project to project.

Despite this history, change has occurred and the domination of Alberta's building trade unions in many areas of construction has given way to a mixture of non-union, alternative union, and traditional building trade relationships. The Registration system, while still a very significant feature of the system with a major market share, no longer covers the large majority of employers and employees it once did. It faces significant competition and has lost its market dominance in some sectors of the industry.

Strikes and lockouts still disrupt construction in many provinces; much more than in Alberta. Disruptions have a ripple effect because of the interdependence of construction workers. In 1970, and more particularly again in 1988, Alberta adopted a multi-employer bargaining system called Registration designed to minimize such disruption. It restricted wage competition by providing for province-wide agreements. It has, since 1988, worked to prevent work stoppages.

The industry has changed. Now some employers bargain with different unions and sign individual collective agreements outside of Registration. Non-union and alternative union contractors want more of this. Since they are outside of Registration each such agreement, when up for renewal, has the potential for a strike or lockout. Some say that, despite this potential, competition will prevent disputes from happening. Those under

the existing system dispute that. They say that these proposals will seriously undermine the existing system, causing harm but no advantage. If these individual negotiations produce higher or lower rates, or different conditions of work, they will have a disruptive effect, redirect labour supply, and once again create the conditions that generate disputes.

Ever since 1947, when Leduc #1 ushered in a new era of prosperity for Alberta, the province has had to recognize that oil and gas revenues are a mixed blessing. They produce great prosperity; the envy of every other province, but they expose government, industry, and citizens to the vagaries of market prices. Just as the provincial budget goes through unpredictable swings, from large surpluses to unexpected deficits, so does the construction industry. There have been times of red-hot growth followed by sudden downturns, with drops in investment, delayed projects and a surplus of highly skilled labour. In good times, owners, unions, and contractors scurry to find the tradespersons they need. In poor times, they scurry to find work to keep their workforces and capital resources employed.

What collectively amounts to Alberta's construction industry is a coat of many colours. Significant financial, institutional, and ideological influences compete with each other for a bigger slice of the pie. Different types of unions compete for employee allegiance and for work. Different types of contractors vie for a place in the industry's various sectors, and adjust their focus, strategies and capacities to enhance their competitive positions. Trades sometimes compete with each other for specific types of work. Service providers compete to offer training, strategic advice, or employment benefits to the industry. Persons and groups with differing views of economics, competition, or labour relations values compete for influence. The industry has lost much of its homogeneity.

Labour legislation, and the policy choices it reflects, plays a major role in the workings and development of this industry. However, its role, at least historically, has been to provide a stable labour relations framework, not to dictate labour relations outcomes or collective bargaining results.

Origins and Scope of this Review

In 2011, a group calling itself the Construction Competitiveness Coalition, consisting of five construction contractors and two associations¹, made submissions to the Government of Alberta. Its submission advocated changes to Alberta's *Labour Relations Code* that, in the Coalition's view, were necessary to create economic advantages through

¹ The participants in this group are described below, along with the other major stakeholders in the industry.

cost certainty; create bargaining structures for today's workplace; and improve fairness for employees and employers.

Government responded by commissioning an informal consultation amongst stakeholders. Mr. John M. Hope, Q.C. and Mr. Dwayne W. Chomyn, Q.C. were commissioned to review the issues and provide the Minister with advice. Stakeholders were notified in the following terms:

Alberta's construction industry is a key driver of our Province's economy. A relatively stable labour relations climate and a skilled and productive workforce have been important factors in the industry's success. The recent experiences in the registration bargaining process are a good example of collaborative efforts to support flexibility and competitiveness within the industry.

However, with increased activity expected in the coming years, and greater competition for investment and labour from other jurisdictions, now is an appropriate time to review Alberta's policies and legislative framework for labour relations in the industry in order to ensure we remain competitive over the longer term.

In due course, Messrs. Hope and Chomyn provided their observations. As a result, the Government commissioned this further review process. As will be seen below, many of the issues raised for debate arose from recent litigation. Further, the Labour Relations Board had received two applications for certification for "all-employee" units in construction, challenging the existing craft based bargaining unit policy. Lingering differences over the issues first raised through the CNRL-Horizon Division 8 approval remained in need of attention.

The mandate for this review does not cover labour relations policy generally, nor open up the *Labour Relations Code* for full review. Labour relations outside of construction, including public and quasi-public labour relations, fall outside the scope of this report. However, this review is not confined to the topics raised originally by the Coalition, although some issues were raised that way. Several of those proposals were presented as free-standing topics, but most were in reality intimately related to the three key features of Alberta's construction labour legislation; the means by which employees can choose or change trade unions, the scope and exclusivity of the Registration system, and the special protections necessary to attract capital to, and coordinate labour relations upon, a mega-project site.

Some issues clearly involve the ongoing exercise of judgment and discretion by the Labour Relations Board. Not all matters are amenable to a legislative solution, particularly when they depend on the particular facts of a given case. Such matters are

best left to the Board and its own consultation processes, along with its ongoing case-by-case decision-making.

Some proposals are advanced on the premise that the *Code* is old and has been unresponsive to changing industrial realities. Yet, significant changes have occurred over the past 25 years within the *Code*'s existing framework. Arguments over the passage of time cut two ways; certain policies and assumptions may indeed be inappropriate today, but one cannot, in the same breath, argue for both change and the status quo, depending on one's particular interests.

Before embarking on an examination of today's challenges, the various stakeholders need an introduction. That is followed by a brief summary of how our labour legislation works, both generally and in the specific case of construction.

Chapter 2 Industry Participants

Alberta's tradespersons work in a variety of industries, some construction, some not. Many are self-employed. Many others use their trade skills working in schools, industrial plants, or in employment with the various levels of government. These persons, while important, are usually only indirectly affected by construction labour relations.

More directly affected are those who work in institutional, commercial, or heavy industrial construction, on pipeline construction, or on road building. Those in residential construction, while subject to wage and supply pressures as a result of these other sectors, are largely unorganized.

The *Labour Relations Code* permits groups of employees, by majority vote, to choose representation by a union of their choice. Many have chosen representation, others have not. Where employees are represented by a trade union it is mostly by one of the sixteen traditional craft unions, by the Christian Labour Association of Canada (CLAC), or by one of several other alternative unions described below. The traditional craft unions will be referred to as the "building trade unions".

The "Coalition" and the "Alliance"

The "Construction Competitiveness Coalition" (for brevity "the Coalition") formed in 2011 to advance proposals for change. During the course of this process, a second group came together, calling itself the "Construction Competitiveness Alliance" (the "Alliance").

The Construction Competitiveness Coalition

The Coalition consists of the Progressive Contractors Association of Canada and the Merit Contractors Association, each described below. Basically, the PCA represents contractors with a bargaining relationship with the Christian Labour Association of Canada (CLAC) and Merit more particularly represents unorganized contractors. The Coalition also includes the following employers:

Flint
J.V. Driver
Kiewit

Ledcor
North American Construction
PCL

Each of these companies (in fact in each case a group of companies) is a significant player in construction, in Alberta, elsewhere in Canada, and in some cases North America and elsewhere in the world. This group, each of which tends to operate more like a general than a trade specific contractor, includes:

- Non-union contractors;
- Alternative union contractors, including contractors that are solely alternative union contractors;
- Contractors that are part of double-breasted or triple-breasted groups of companies; and
- Contractors that are primarily organized by alternative unions, but that also have relationships with Building Trade Unions.²

The Christian Labour Association of Canada is not a member of the Coalition.

The Construction Competitiveness Alliance

The Alliance was formed to respond to this review. It consists of both Employer groups and all the building trade unions. It includes all the main Registered Employers Organizations in general construction, but not those involved in the pipeline, specialty and road building sectors. They are:

- Construction Labour Relations Alberta and its 17 trade division REO's
- Boilermaker Contractors Association
- Electrical Contractors Association of Alberta
- Industrial Contractors Association
- All 22 locals of the 16 building trades unions, described below.

The Alliance thus covers almost all those unions and contractors directly involved in the general construction Registration and collective bargaining provisions of Part 3 of the *Code*. Collectively, they perform between 60 and 80 million hours of construction, maintenance and fabrication work each year. The Alliance has demonstrated an ability to find a high degree of labour-management consensus, within a very significant part of the industry.

² A fuller description and these terms is given below under the title "Breakdown in the Concept of the Employer" in Chapter 7.

Construction Labour Relations, an Alberta Association (CLRa)

The CLRa is an umbrella organization representing the Employer's engaged in much of Alberta's general construction industry. Formed in 1970, it has been acting as the chosen (Registered) employers' organization for all employers with bargaining relationships with each of the building trade unions, in most of the trades and sectors of the industry.³ Trade divisions for most registered trades fall under the CLRa's umbrella. These trade divisions allow a measure of autonomy for contractors that work in specific craft areas (for example Structural Ironwork or Pipefitting) to negotiate terms specific to their industries' interests with the union primarily involved in each craft area.⁴ The CLRa is a member of the Alliance.

Other Registered Employers Organizations

Registered Employers Organizations conform to the "parts in the industry" prescribed for Registration. In addition to the CLRa's members, there are other REO's in the Alliance; the Industrial Contractors Association, the Boilermakers Contractors of Alberta, and the Electrical Contractors of Alberta.

The only REO operating in the Pipeline Sector is the Pipeline Contractors Association of Canada which holds all four Registrations. The Alberta Road Builders and Heavy Construction Association holds the Operating Engineers Registration in the Road Building Sector.

Other Registrations are held by the Canadian Automatic Sprinklers Association, and trade specific organizations for the Masonry, Glass Worker, Painter, and Tile Setter trades. The NDT Management Association and the Alberta Crane Owners' Association hold Specialty Sector Registrations.

The Progressive Contractors Association (PCA)

Founded in 2000, the Progressive Contractors Association of Canada primarily speaks for construction contractors whose employees are represented by the Christian Labour Association of Canada. Its members and affiliated companies represent more than 20,000 construction employees across Canada. Members of the PCA in Alberta include affiliates of several of the employer members of the Coalition such as PCL Energy, J.V. Driver and Peter Kiewit.

³ A fuller explanation of the Registration system, trades and sectors follows below in Chapter 5.

⁴ A list of all REO's and the Building Trade Unions with whom they negotiate is contained in ALRB Information Bulletin No. 12, Appendix 2.

The Progressive Contractors Association does not act as a Registered Employers Organization with respect to bargaining with CLAC. It is a member of the Coalition.

The Merit Contractors Association

The Merit Contractors Association has been a presence in Alberta since the late 1970's. It promotes the "open shop" or "merit shop" non-union approach to construction. It has provided the unorganized construction sector with health, welfare, and benefits options that give an alternative source for the type of benefits offered by the building trade unions. It offers training programs and recruiting assistance. The Merit Contractors Association promotes what it views as the advantages of non-union construction and actively seeks legislative change, both provincially and nationally. It has affiliates across Canada. It expresses many of the same views as, and collaborates with, the U.S. based Associated Building and Contractors Inc. (ABC Inc.) organization that promotes merit shop principles in the U.S. The Merit Contractors Association is a member of the Coalition.

The Building Trade Unions

Alberta's sixteen building trade unions are divided on craft lines. All are affiliated with the Alberta Building Trades Council, and the Canadian Building Trades Council. Each is a local of a parent craft union operating throughout North America. There are jurisdictional rules as to which craft does what work, with both Alberta and Canadian processes, to resolve disputes about these rules. Each operates on the hiring hall model. Collectively, the building trade unions represent about 75,000 Alberta construction employees. They also bring members from elsewhere in North America to supplement the local membership in times of strong demand. The individual unions are:

Boilermakers Lodge 146

Ironworkers Local 720 and 725

Bricklayers Local 1 and 2

Millwrights Local 1460

Carpenters Local 1325 and 2103

Operating Engineers Local 955

Construction & General Workers Local 92 and Local 1111

Painters & Allied Trades Local 177

Elevator Constructors Local 122 and 130

Plasterers & Cement Masons Local 222

IBEW Local 424

Sheet Metal Workers Local 8

Insulators Local 110

Teamsters Local 362

United Association of Plumbers and
Pipefitters Local 488 and 496

UNITE HERE Culinary Workers Local
47

Some of these locals are very large; on a par with those in the major cities of North America. Many run sophisticated training centers for their members.

The General Presidents' Maintenance Committee for Canada (GPMC)

National Councils represent all the affiliated building trade unions that specifically deal with, and contract for, work in the industrial contract maintenance industry. Known as the GPMC, the formal titles are the General Presidents' Maintenance Committee for Canada and the National Maintenance Council for Canada. These committees have operated nationally since the 1950's, and in Alberta since the 1960's.

The committee primarily negotiates two maintenance agreements on behalf of all the affiliated building trade unions. They are the General Presidents' Maintenance Agreement (GPMA) established for on-going, continuous maintenance work, and the National Maintenance Agreement (NMA) which applies to short duration, intermittent type (turn-around or shutdown) maintenance.

These multi-trade collective agreements, negotiated by the GPMC with maintenance contractors, have their own fixed terms. However, they use the mechanism of picking up many of the rates and conditions negotiated under the last current Registration agreement in each Province.

The Christian Labour Association of Canada

The 40-year-old Christian Labour Association has grown quite rapidly since 1988, in Alberta and elsewhere. Of the so-called "alternative unions" currently operating in Alberta's construction industry, it represents the largest number of construction employees, with currently about 18,000 members in Alberta. It holds over 500 construction and 60 general construction certificates, representing bargaining relationships with 96 contractors. It provides training facilities for its members and provides some hiring hall services. It also provides its members with health and welfare benefits.

It is of particular relevance to the Division 8 debate that CLAC Local 63 entered into a bargaining relationship with Horizon Contract Management Ltd., the principal contractor on the CNRL Horizon project. The CLAC is not and has never been a member of the Coalition, or of the Alliance.

Unifor (formally CEP)

Unifor is a very new Union, arising from the recent merger of the Canadian Auto Workers (CAW) and the Communications Energy and Paperworkers Union (CEP). The CEP in turn was an amalgamation of the Energy and Chemical Workers Union which for a long time had a strong presence in the operating plants in Alberta's electrical generating and petrochemical industries, and the International Woodworkers of America, with a strong presence in the lumber, pulp and paper industry.

While in the past the constituent parts of Unifor were less active in the construction contracting industry, they undertook many capital projects on behalf of owners in the power generation, lumber, and pulp and paper industries. In addition, in their role as bargaining agent for the operational employees in many plants, they represent a significant number of tradespersons employed directly by the owners of industrial plants that have reached the production stage.

Beginning in 2005 in B.C., Unifor's predecessors became directly involved in the construction industry, partly as a result of the "Canadian Autonomy Movement" and the decision of the B.C. Council of Carpenters to leave its International. Unifor is a Canadian union with locals across the country. It chartered Local 3000-C to represent construction employees in Alberta. It also has a partnership with FTQ – Construction, one of Quebec's major construction unions. It is Unifor's expressed intention for the future to aggressively organize employees within the construction industry.

CMAW

The Construction, Maintenance and Allied Workers Union (CMAW) is an independent Canadian Construction Union that operates in B.C., Alberta, Saskatchewan and the Northwest Territories. Based in British Columbia, it grew out of a decision by the Carpenters Union in that province to sever its affiliation with the Building Trades. It supplied 2,400 tradespersons to work on the Horizon Oil Sands Phases 1 and 2.

Construction Owners of Alberta

The owners of major industrial construction projects in Alberta have their own organization providing leadership for Alberta's heavy industrial and industry maintenance industries. It champions safe, effective, timely, and productive project execution, through dialog and the promotion of "Best Practices" on key industry topics. It publishes working papers and annual reviews detailing the state of the industry, benchmarking industrial performance, and providing forecasts for long-term guidance.

Its principal members are the owners who use construction services in their day-to-day activities. It has, as associate members, entities engaged in the construction industry itself, including construction contractors, engineering contractors, labour groups and government.

Chapter 3 How the *Labour Relations Code* Works

The *Labour Relations Code* includes Part 3 – Construction Industry Labour Relations. The title implies it covers all of construction labour relations, which it does not. Its primary purpose is to set out the special Registration provisions governing multi-employer bargaining rights, and the carefully regulated bargaining cycle established under Registration.

Other aspects of construction labour relations are covered by the same *Labour Code* provisions that apply to other industries; this includes the processes for certification, ratification, decertification, bargaining proposals and unfair labour practices.⁵ A brief review how and why our *Labour Relations Code* works generally is therefore useful before exploring the special construction provisions.

Without laws, employees have the power to join together and stop or disrupt work to achieve their goals. Without laws, employers have the power to stop production. Law can regulate such activities, but its effectiveness in doing so depends on labour (that is employees and their unions) and management each being willing to respect those laws. Passing a law does not, automatically and of itself, change the way people behave. Legal enforcement is often too slow and too legalistic to provide an effective means of controlling labour and production. Laws work best when the majority of people understand and voluntarily comply with the law's restraints. Punishment and deterrence alone is usually, and has proven historically to be, too slow and ineffective, particularly when the objective is to keep people working productively and the economy flowing freely.

Unions have existed in North America, in some form, for over 200 years. The present system of labour relations emerged in the late 1930's, and became fully formed in the late 1940's and early 1950's. It has evolved significantly since then, particularly in Canada, where each Province and the Federal Government have developed variants on the basic model, each to suit their particular social and economic environment.

Some believe the basic model works well, others that it does not. Those views will be touched on later, following a summary of the "bare bones basics" of the *Code*.

⁵ To the extent there are different ways of applying the *Code's* general rules in the Construction Industry, these are mostly set by Labour Relations Board decisions or by its standing policies. See: Appendices 1 and 2.

Labour disputes cause economic and social disruption to people and businesses not directly involved in the dispute. That basic fact remains as true today as it has proved to be throughout history.

As the size of employers grew, and the influence of individual employees waned in comparison, employees joined together in various ways to try to improve their position. Sometimes they demonstrated, sometimes they would collectively withdraw their services in an attempt to achieve change. Employer's sometimes responded by recognizing the employees in groups, discussing matters, and accepting change. At other times they responded, as some do still, by saying "those who do not like what I offer are free to go elsewhere". Until the 1900's in North America, to the extent it was not classed as criminal activity, all this was largely regarded as just "the hidden hand of free enterprise" at work. Labour disputes were seen as private matters not raising any public concern.

It took the Lethbridge coal strike, over the winter of 1906-07, for Canada to recognize the overriding public interest in labour relations. Settlers burned fences to keep warm and trains stopped running; this, while miners stayed off work and coal production shriveled. The intransigence of both sides cried out for neutral intervention. Such intervention became law.⁶

Labour management clashes escalated through the 1920's. As vast new steel and automobile industries grew, new industrial unions developed among increasingly vulnerable and concentrated workforces. Random strikes and lockouts, with related and often violent outbreaks between union supporters and private security firms, followed. Then the depression of 1929 hit. Our current North American system emerged as one of the initiatives to rebuild a working economy after the depression.

The U.S. *National Labour Relations Act*⁷ was a compromise, brokered between employers and unions. It recognized that employees had the power to strike and would often do so unless they had realistic workable alternatives for resolving their concerns. It recognized that random lockouts, like strikes, could disrupt an increasingly interdependent economy affecting other workers, other businesses, and the public at large. The approach was to identify acceptable solutions for the underlying reasons behind strikes and lockouts. These problems, and these solutions, still provide the rationale for today's labour legislation.

⁶ This dispute led directly to the passing of the *Industrial Disputes Investigation of 1907* which made conciliation processes compulsory in important labour disputes.

⁷ Popularly called the "*Wagner Act*" after its sponsoring Senator Wagner hence the term "*Wagnerism*" for the system of labour relations now used throughout North America.

The legislation was opposed then and still now by those on the left who felt it undermined the power of labour and the ability to use that power politically in what it viewed as a class struggle. Equally, it was opposed then, and now, by some on the right who felt it gave legitimacy to unions and undermined an employer's right to manage their business without having to bargain collectively if they chose not to.

Industrial disruption had three main causes, for which the new labour laws provided three solutions.

Problem: The demand by employees and their unions for, and sometimes the refusal by employers to give, union recognition. Employees wanted to bargain with their employer as a group, and employers wanted to deal only with individual employees.

Solution: Recognition disputes were replaced by a "majority rules" certification system followed by an obligation to bargain in good faith with the Union, but only once certified.

Problem: Even where employers recognized a union as the employees' representative, they often disagreed on what wage rates or conditions of employment any agreement should contain. They would talk, but disagree, resorting to strikes and lockouts to force their demands.

Solution: Industrial disputes over the contents or renewal of a collective agreement were permitted, but only at certain times, and only after mandatory good faith bargaining.

Problem: Even once agreements were reached, there were disputes about whether that agreement was being lived up to.

Solution: Alleged breaches of a collective agreement were required to be resolved by a system of mandatory arbitration ("rights arbitration").⁸

Despite roots in the U.S. experience, Labour Codes have adapted in Canada. The Canadian adaptations have been easier to achieve. Under the U.S. laws, it is the Federal Government that regulates most labour laws making them hard to change, whereas Canada gives both Federal and Provincial responsibility, making change easier, but making the laws across the country less uniform as a result.

⁸ While this was not in the original *Wagner Act* it has always been part of the Canadian system.

The *Labour Relations Code*, for Alberta, puts legislative flesh on these basic bones.

The third solution, rights arbitration, plays little part in this review, except that it prohibits any strike or lockout during the term of a collective agreement. Instead it requires, by law, that all grievances during that term be resolved by some method like arbitration⁹. In construction, the various parties have adopted different types of arbitration, but by and large their processes work well.

More relevant are the other two solutions: Certification and Bargaining Collective Agreements.

Union Recognition and Certification

Certification allows employees to choose a union if they wish. The practical reality is that if a group of employees decide to get together and demand that their employer meet with them and negotiate over the terms of their employment, there are only a few available options. Some options, while seemingly available, work poorly. Employers can fire the employees and seek replacements, but that is disruptive; experience is lost, and skilled replacement employees are often unavailable. The employer can shut down production and try to outlast those demanding negotiations, but production suffers and any resulting picketing, or the response to picketing, can result in social unrest or violence. Lost production often disrupts markets, suppliers or customers. The employer can recognize the group and meet with them to try to resolve issues, but may be reluctant to do so if they feel the group only represents a minority of their workforce.¹⁰

The *Labour Code* prohibits strikes or lockouts over union recognition and makes agreements arrived at through picketing unenforceable. In exchange, the *Code* provides employees and their unions with the alternative process called certification. Employees have the legal right to join a union. A union claiming to represent the majority of employees in a group "appropriate for collective bargaining"¹¹ can apply to an independent board to be certified. If the union can show, through a vote, that they have majority support, they are certified for that bargaining unit. If they fail to show majority support, they lose the application and cannot reapply for a set period of time. Majority support and certification results in two things:

1. It gives the Union the exclusive right to bargain for each employee in the bargaining unit, whether that individual supported the Union or not.

⁹ See section 135 of the *Labour Relations Code*.

¹⁰ History, the world over, but specifically in the U.S. and Canada is replete with examples of each of these situations.

¹¹ This "appropriate group of employees" is customarily called a "bargaining unit" and is discussed in more detail below.

2. It gives both the Union and the Employer the right to require the other to meet and to bargain in good faith with a view to concluding a collective agreement to cover all the employees within the bargaining unit.

Certification works when it in fact provides a realistic alternative to recognition disputes. It is the effectiveness of the certification system that provides the practical and moral ability to prohibit strikes and lockouts over recognition. Historically, while simply saying you cannot strike or lockout over recognition has not worked, saying you cannot do so because you have another practical and legal way of resolving union recognition questions has worked; not perfectly, but generally.

Certification is a majority choice system. If a majority of employees choose representation they do so for all employees of the employer in the unit.¹² If a majority does not give its support, then the Employer has no obligation to recognize or bargain with the union at all.

Some argue that it is unions, not employees that seek certification, and characterize them as third party interlopers in the employment relationship. Unions rarely arrive without some initial employee support and they only succeed once they achieve majority support. Employees act through unions for self-protection; historically speaking collectively though a union has left individuals less exposed to retaliation.

Other countries take a different approach, allowing employees to join, and requiring employers to bargain with, whichever union particular employees wish, without regard to majority support. This is similar to the difference between countries that use a “majority rules” constituency based electoral system and those that use a system of “proportional representation”.

This North American choice of a majority support system means there is always dissent. There are those who differ from the majority; who want a different union or no union. There are those unions with the support of only a minority, who would like to attract a majority but have been unable to do so. There are employers who would rather have no union, or a different union. The continued existence of dissenting views and competing interests is inherent in any majority rules (“majoritarian”) system.¹³ It is the reason why choices, once made, can periodically be revisited.

¹² The *Labour Codes* exclude certain persons from the definition of employee such as managers and professional employees. See s. 1(1).

¹³ The majoritarian principle has been hotly debated and widely litigated in the U.S. as minority interests within bargaining units (often formed on gender or racial lines) have sought a collective voice with their employer distinct from that of the majority.

Certification is not just about the initial choice of a union, to be made once for all time. Central to the system is the periodic opportunity during a pre-set time (called a "window period") to change unions or decertify the one in place.

Like elections, representation in labour relations requires some basic institutions in order to work. Someone has to set the "constituency" or voting boundaries; in labour relations this involves setting the "appropriate bargaining unit" about which more will be said below. It requires rules about when and how the choice will be made, or revisited; the form of vote, and the time at which such votes are taken. This carries with it the recognition that support may wax and wane over time and that the timing of a vote can influence the result. The electoral analogy is to the debate between fixed date elections and a date chosen by the Government in power. The system has to be supervised by some neutral body, which in labour relations is the Labour Relations Board.

This analogy to elections can only be taken so far, but it is useful in describing some of the challenges in administering a "majority rule" system and assessing some of the proposals for change that are the substance of this review.

A certification system has to be credible to achieve general acceptance. It must provide a real, not a superficial or discredited alternative to recognition strikes or lockouts. Employers, once certified, must accept the bargaining obligations that follow, and employees and unions must accept that, without that, they obtain no ability to force an employer to bargain.

Before moving on to the bargaining process a few words are in order about voluntary recognition. Even before labour codes, employers could recognize a trade union and bargain with that union voluntarily when it truly represented employees. Voluntary recognition is still an accepted practice and provided for in the *Code*. It achieves basically the same thing as formal certification except that it may be terminated. However, if the employer does so, the *Code* gives the unions involved a special opportunity to affirm their status through certification.¹⁴

The Labour Relations Board¹⁵ put it this way:

[18] Voluntary recognition must never be viewed as a mechanism to avoid the need for the union to have employee support in order to serve as the employees' bargaining agent.

¹⁴ See section 42-44 of the *Code*.

¹⁵ Certain Employees of Raydon Rentals and IAMAW Local 99 and Raydon Rentals [2005] Alta. L.R.B.R. 324 at 331.

... “Voluntary recognition is not a way of circumventing the employees’ freedom to choose union representation, but of facilitating that choice.” *Sie-Mac, supra*, at page 883. As indicated in section 42 of the *Code*, the trade union seeking voluntary recognition must be “acting on behalf of the employer’s employees”.

[19] A union does not have an independent right to bargain collectively with an employer on behalf of employees. A union’s right to do so flows only from the employees’ choice that they wish to bargain collectively with their employer through a bargaining agent.

Bargaining Collective Agreements

The *Labour Code* prohibits strikes and lockouts during the agreement’s term. It recognizes that, periodically, terms and conditions of employment need to be adjusted to reflect changing market conditions and changing employee or employer demands. In all but the public sector¹⁶, it does not prohibit strikes and lockouts over either a first, or the renewal of a subsequent, collective agreement. Strikes or lockouts are thus allowed for this limited purpose, but only subject to the following preconditions, designed to prevent avoidable work disruption.

- There must have been an exchange of proposals followed by good faith bargaining.
- There must be a period of third-party mediation, with a neutral person trying to bring the parties together.
- Any strike action and any multi-employer lockout action must be approved by a majority of those who will be affected. A union cannot strike without a vote showing majority employee support.
- 72 hours’ notice is required to allow last minute negotiations and an opportunity to wind down the operation in an orderly way, if necessary.
- Employers or unions can force a vote or employer choice on a proposal once during a dispute and, if accepted by the employees, that vote resolves the dispute.

¹⁶ The debate over public sector labour relations is well beyond the scope of this review and is of little help in understanding the construction sector. This is so, subject to one exception. It is an area where the government is placed in a different role; that of employer. In the private sector, its interests are in maintaining a fair and balanced system to ensure the economy and society runs smoothly. The debate over its public sector role as employer sometimes influences the debate over the appropriate role for government in private sector labour relations.

- At times the government can call a Disputes Inquiry Board to help resolve the dispute.

Collective agreements, once negotiated, must have a fixed term. Strike and lockouts become illegal during that term.

In Alberta, it is the agreement's term; its expiry date, that is used to establish the "open periods". One "open period" is the months during which a different union may apply to be certified, or the employees may seek to decertify. A similar period defines the dates during which either party can force the other to meet and bargain over renewal of the collective agreement.

To this point the *Labour Code* and how collective bargaining works, has been described from a pragmatic point of view; as problems, and solutions to problems, that arise when employees and employers have conflicting interests. These solutions, however, once embedded in a *Labour Code*, take the form of laws. Laws set out specific rights and responsibilities, the fine points of which are amenable to debate; a debate that can sometimes lose touch of the overarching themes of the *Labour Code* when read in its entirety.

One of Canada's finest labour arbitrators and certainly one of its most knowledgeable construction industry specialists observed in 1969:

There are many measures which have been recommended to governments in Canada in the recent past for the more effective dealing with industrial disputes and their consequences. I have already expressed my view that industrial relations being human relations cannot be solved by law alone. Too often laws are enacted in this field which cannot be enforced and legislation which is not enforceable serves only to bring the law in disrepute. I agree with the conclusion reached by Professor Kahn Freund, of Oxford University, when he says that "the longer one ponders the problem of industrial disputes, the more skeptical one gets as regards the effectiveness of the law. Industrial conflict is often a symptom rather than a disease. I think we lawyers would do well to be modest in our claims to be able to provide cures."

Disputes over labour law, except for grievance arbitration, fall primarily to the Labour Relations Board to decide in the first instance, subject to supervisory review by the Courts. Labour Boards from the outset have been tri-partite, with neutral chairs and vice-chairs sitting with panels drawn from labour and from management. While Labour Boards have considerable scope to establish policies within the *Code's* framework, they,

like any quasi-judicial tribunal, are bound by the legislation and must decide cases in a way faithful to that legislation.

Chapter 4 Individual Rights, Collective Rights and the Charter

The *Labour Relations Code*, in its preamble and in its more specific provisions, recognizes and gives legal effect to a right to free collective bargaining. The preamble says:

WHEREAS it is recognized that legislation supportive of free collective bargaining is an appropriate mechanism through which terms and conditions of employment may be established;

Free collective bargaining must be distinguished from the results of that bargaining. The *Code* provides a process, leaving the result, an agreement signed by both sides, to market forces and each side's perception of their own interests. The following definition, by former Chief Justice Bora Laskin¹⁷ still aptly describes collective bargaining as envisioned in the *Labour Code*:

Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.

The *Labour Code* provides for collective bargaining through trade unions. It recognizes them as legal entities, much like the *Business Corporation Act* recognizes the ability of individuals to join together and create a corporation to carry on a business. While unions existed before the *Labour Codes*, it is the *Labour Code* specifically that gives a Union the legal right to bargain with an Employer once selected by a majority.

Trade unions must be, by law, and are in fact, organizations of employees. The *Code* defines trade unions, and that definition is designed to exclude sham organizations.¹⁸

1(x) "trade union" means an organization of employees that has a written constitution, rules or bylaws and has as one of its objects the regulation of relations between employers and employees;

¹⁷ Quoted at para. 29 in *Health Sciences and Support v. B.C.* [2007] 2 S.C.R. 391.

¹⁸ Several other sections support this definition and prevent abuse; s. 11(3)(d), s. 24, 2. 25(1) and s. 34(1)(a), s. 38(1) and s. 148.

The *Labour Relations Code* recognizes the right of employees to join a trade union and to participate in its lawful activities. This is one aspect, at least, of the freedom to associate about which more will be said shortly.

21(1) An employee has the right

- (a) to be a member of a trade union and to participate in its lawful activities, and
- (b) to bargain collectively with the employee's employer through a bargaining agent.

The choice of a trade union belongs to the employees, not to the Employer. The *Labour Code* prohibits the certification of unions dominated or unduly influenced by an employer.¹⁹ It also makes it an unfair labour practice for an employer to engage in activities that interfere with a trade union, including at times, actions that may give one union preferential treatment over another.²⁰

Some employers accept their employees' right to choose a union and bargain with that union once it becomes certified. Other employers would rather not have to deal with a union at all, or only with a union they choose. Sometimes an employer's resistance is expressed through political action to make certification processes more "employer friendly" or more difficult, depending on one's point of view. Sometimes it is expressed through efforts to influence the employees in their choice of unions, or against choosing a union at all.

The *Code* provides a series of protections, many in the form of unfair labour practices, to preserve to employees, rather than the employer, the right to decide whether to have union representation and, if so, by which union. One of the most important protections is s. 148:

148(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

- (a) participate in or interfere with
 - (i) the formation or administration of a trade union, or
 - (ii) the representation of employees by a trade union,

¹⁹ See section 38.

²⁰ See section 148(1) which describes these prohibitions and s. 148(2) which list acceptable conduct that does not fall within the prohibitions.

or

(b) contribute financial or other support to a trade union.

This is subject to some exceptions; prominent among them s. 148(2)(c):

(2) An employer does not contravene subsection (1) by reason only that the employer

(c) expresses the employer's views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

Beyond the union or no union question there is a further debate. That is, if there are to be unions, what powers should they be able to exercise, both in bargaining with the employer and in their relations with the employees (some dissenting) they represent?

Again, the *Code* provides a series of protections, many in the form of unfair labour practices, that balance individual rights with collective rights exercised through the chosen union. Disagreement exists about the appropriate balance between individual employee rights and the right of a group of employees to make choices, collectively through their trade unions and through bargaining. However, trade unions and others who believe in collective bargaining as a system are often suspicious when "individual rights" are promoted and advanced through legal proceedings, or through political action, by organizations of employers philosophically opposed to collective bargaining at all.²¹

There is a whole spectrum of views on these issues; the following are merely points on that spectrum.

Some believe the whole concept of collective employee rights is a mistake and that Employers and Employees should always remain free to deal with each other directly, without any "third party" involvement. They view employee efforts to join together and to bargain collectively based on a majority basis as fundamentally illegitimate.

Some believe that, while there need to be collective rights, they should interfere as little as possible with the free choice of individuals, giving the maximum choice to opt out of things they do not like, or with which they individually

²¹ This is perhaps self evident, and noted generically rather than by citing such concerns raised in many union submissions particularly in respect to the Merit Contractors' Association.

disagree. Some accept unions but not the majoritarian aspects of the North America's system.

Some believe that there is an inherent imbalance between the power of employers and employees, the more so the size and wealth of the employer. Collective rights should be sufficiently robust to give employees real countervailing economic power when balanced against the employer (usually a corporation) with which they bargain.

Some believe that society involves an ongoing clash between the working classes and the managerial and ownership classes and that any system that restrains workers collective ability to exercise their power is oppressive.

Labour Codes seek to find a suitable balance. In the past that balance has been set mostly by experience, adopting a pragmatic view of what works best to provide a credible and effective system for recognition and bargaining that in fact maximizes labour peace and in fact reduces the harmful side effects of labour management conflict.

These various ideologies and attitudes permeate the debate over what any *Labour Code* review ought to aim for. To the extent parties view unions generally as undesirable, or collective rights are less important than individual rights, consensus is difficult to achieve. The same is true for parties who see action by labour in terms of a political power struggle. In contrast, there is a relatively strong ability to achieve consensus among those who accept the pragmatic approach to setting union-employer balance and are comfortable working within its terms.

The Charter of Rights and Freedoms

One point of this somewhat philosophical discussion relates to the uncertain influence of the Charter of Rights and Freedoms. That is an important question for this review given the challenges currently being taken in other jurisdictions and the lawsuits taken in 2007-2008 arising out of the use of Division 8 by CNRL discussed in more detail below. The *Charter* governs all other laws, including the *Labour Relations Code*. The parts said to affect labour relations laws are short:

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Ever since the *Charter's* introduction in 1972, long after our *Labour Codes* were adopted, there has been a debate, and ongoing litigation, over whether the *Charter* was intended to, or in fact does, affect labour legislation, particularly by its guarantee of freedom of association.

Efforts to alter labour laws by claiming *Charter* protections or violations have come from all sides. Individuals, alone, or as surrogates for interest groups, have sought to use it to free individuals from majoritarianism; asserting rights to be free of requirements for membership, the payment of dues, or to restrict the use of union funds. Unions have invoked the *Charter* to challenge restrictions on the right to strike, or to expand collective bargaining into groups hitherto excluded, such as farm workers or the RCMP. Initially, at least, the Supreme Court of Canada took a hands-off approach perhaps best described in a 2001 case involving the Quebec's construction industry:²²

156 Looking back over nearly 20 years of the application of the *Charter*, it is clear that this Court has been reluctant to accept that the whole field of labour relations should fall under the constitutional guarantee of s. 2(d). The law of collective bargaining, as it has developed in Canada since the Depression beginning in 1929 and the Second World War, as well as union and employer conflicts like strikes and lockouts, have been left largely to legislative control based on government policy. Laws restricting the choice of a bargaining agent or forbidding strikes and lockouts were deemed not to engage the guarantee of freedom of association as such. The social and economic balance between employers and their collective unionized employees was viewed as a question of policy making and management of sharply conflicting interests. Thus, it was thought more appropriate to leave the resolution of such conflicts and the policy choices they required to the political process.

²² *Advancing Cutting and Coring* [2001] 3 SCR 2009. Justice LeBel, in the minority, was speaking particularly of three cases decided in 1987, often referred to as the "Labour Trilogy".

However, in 2007, in response to sweeping legislation in British Columbia concerning health care labour relations, the Court's position changed, bringing the whole "freedom of association" issue back into question. The Court held that the guarantee of freedom of association in the *Charter*, despite earlier cases, included a procedural right to collective bargaining²³. The Court's new position was summarized in two paragraphs.

19 At issue in the present appeal is whether the guarantee of freedom of association in s. 2(d) of the *Charter* protects collective bargaining rights. We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter: Dunmore*. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.

20 Our conclusion that s. 2(d) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(d) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(d) as including a right to collective bargaining is consistent with and indeed, promotes, other *Charter* rights, freedoms and values.

By 2011 with the decision in *Fraser*²⁴, the Court's position had altered somewhat. *Fraser* challenged the exclusion of farm workers in Ontario's *Labour Relations Act*. Many observers have difficulty reconciling *B.C. Health* and *Fraser*. While purporting not to reverse *B.C. Health*, *Fraser* has left many in doubt as to where the Supreme Court of Canada might go in the future. The case clearly says that while s. 2(d) does not incorporate a particular "Wagner Act" style of the freedom to associate, it does encompass something. For example, the Court said at para. 42:

²³ *Health Services and Support v. B.C.* [2007] 2 S.C.R. 391.

²⁴ *Ontario (Attorney General) v. Fraser* [2011] 2 S.C.R. 3.

What s. 2(d) guarantees in the labour relations context is a meaningful process. ...

One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(d) associational right, and both must be justified under s. 1 of the *Charter* to avoid unconstitutionality.

and again at paragraph 47:

What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.

Cases are still outstanding on these issues. One case is worthy of mention since it arises out of recent Saskatchewan legislation; the *Public Service Essential Services Act* and the *Trade Union Amendment Act*, the latter making it somewhat more difficult for unions to become certified and opening up a new option for all-employee units in construction. Both acts were challenged under the *Charter*.

The trial judge²⁵ quashed the legislation. His reasons provide a detailed counterpoint to the rather uncertain comments in *Fraser*. The Saskatchewan Court of Appeal reversed Justice Ball's ruling, but mostly on the principal that, if the law is to change, it is once again up to the Supreme Court. What the Court did say, with judicial delicacy (and understatement), is that the Supreme Court's rulings so far are not clear:

Dunmore, *Health Services* and *Fraser* do, of course, go some considerable distance toward upsetting the logic underpinning what the *Labour Trilogy* had to say about the constitutional status of the right to strike. Nonetheless, the implications of those recent decisions are less than wholly clear.

[52] This lack of clarity flows in substantial part from what might be called uncertainties as to how, on any future appeal, the Supreme Court might choose to characterize the right to strike for purposes of s. 2(d) analysis.

This uncertainty is significant for the issues discussed in this report. First, to the extent our laws seek to encourage investment, legislative changes that will predictably trigger

²⁵ Former Saskatchewan Labour Relations Board Chair, Justice Dennis Ball.

serious *Charter* challenge may, for a significant time, undermine the stability project proponents seek. The 2007 challenge to Division 8 and its aftermath support this view.

A prominent management labour lawyer, Morton Mitchnick²⁶, speaking to a Saskatchewan conference in May 2013, offered the following caution to governments, after considering *Fraser* and the more recent Saskatchewan litigation.

First, if government is considering legislation which will abrogate some of the “normal” rights of collective bargaining in Canada, it is wise to give employee representatives a genuine opportunity to consult while the proposed Bill is still under development. The government will want to show, for example, that it came to the consultation process with its mind still open, and that less restrictive measures were either tried or considered.

Similarly, it is important to ensure that with any abrogating legislation its restrictions on collective bargaining rights are proportionate to its stated objectives. Courts are generally not inclined to consider “cutting costs” a sufficient reason to curtail labour relations rights, except in circumstances of serious economic disruption. It is thus important to ensure that restrictive legislation is designed to pursue important goals in a rational and proportionate manner. And once again, a fulsome consultation process is likely to weigh heavily in the Court’s determination as to whether the “minimum impairment” test has been met by the government.

At bottom, *Fraser* has undoubtedly lowered the bar for governments to pass the constitutional test for compliance with the *Charter* in dealing with matters of collective bargaining and labour relations. It is up to governments now to conduct themselves in such a way that the current “gains” arising out of *Fraser* will not be lost in the cases that lie ahead.

Whatever the impact of the *Charter* debate, our labour law framework contains its own logic, balance, and justifications based on experience. It is a mistake to assume that “passing *Charter* scrutiny” means proposed changes to labour laws are good public policy. The *Charter* may impose certain limitations on labour law experimentation and reform, but it does not purport to balance all the interests involved in a way that will actually work.

In short, proposals for labour law change have to be assessed on their utility, fairness and balance as labour laws. Poor laws can meet the *Charter*’s requirements but do not, by doing so, become good laws. However, laws that violate the *Charter*’s restraints may be set aside, often leaving several years of uncertainty in their wake.

²⁶ Morton G. Michnick, Borden, Lardner, Gervais, *Where are we after Fraser? The Constitutional Right to Collective Bargaining in 2012*. Michnick is a former arbitrator and one-time Chair of the Ontario Labour Relations Board.

Chapter 5 How is Construction Different?

Some assumptions about industrial workplaces break down when applied to the construction industry. The *Code* to some degree assumes that each employer has a relatively stable workforce over time. Employers engaged in the construction industry have fluctuating employee needs, based on their current projects.

Some contractors, particularly in the residential and commercial sector, can maintain a core crew of employees and more or less keep them working steadily over time. The longer and larger the project, the less true this becomes. Large-scale projects require employees to be present as and when needed. The demand for tradespersons with particular craft skills changes over time as the project progresses. Employees are usually hired and laid off on an "as needed" basis.

The careers of tradespersons who work for construction contractors are unique. They say, "their task is to work themselves out of a job". They will usually work for a series of employers, and on a series of projects, as contractors and projects need their specific skills. They do not experience the same continuity of employment as workers in industrial plants, even though they may do similar work using similar skills.

Half-way between the industrial plant and the construction site sit a variety of employment situations and employers that use tradespersons involved in commercial fabricating shops, modular yards, construction fabricating shops, service and repair shops, and the like.

The transient nature of construction employment has led many employees to identify with and look for work through their trade union, and historically this has mostly been the trade union for their particular craft (labourer, electrician, pipefitter, etc.). This was commented on in the Dubinsky Report²⁷ in 1974:

A major destabilizing factor of the construction industry is the high level of employment insecurity which it represents for the majority of construction workers. Employment is broken every time a specific building project is completed and the employer-employee relationship is thus terminated. As a result, the trade union and not the contractor is the recipient of the unionized construction worker's loyalty, it being the principal permanent force in his work life. In addition to acting as bargaining agent, recipient of complaints about working conditions and a representative of its members in grievance procedures, the construction trade union, and especially the union local, is the agent of the construction worker in obtaining and maintaining employment.

²⁷ *Construction Labour Relations in Alberta*, Murrey Dubinsky, Q.C., Construction Owners of Alberta, April 1976

Since the mid-1980's there has been a growing ability for tradespersons to obtain employment and benefits in the construction industry through means other than the craft union hiring halls. While the allegiances of many remain with their building trade union, there has been an empirical increase in those preferring to, willing to, or simply able to obtain employment and sometimes representation through other avenues.

There are also major differences on the Employer's side of the relationship. A non-construction employer customarily has a defined ongoing business, perhaps with a variety of customers, but usually undertaken at fixed premises. In the construction industry, the focus is on the owner, and the project the owner wishes built, be it a house, a high-rise or a refinery. While owner practices vary, it was customary for the owner to seek out a "prime contractor" to undertake the whole project, doing so using a combination of its own workforce and the services of many specialty subcontractors, each arranging a workforce for their part of the project. Many such specialty contractors are also structured more or less along craft lines, for example, scaffolding contractors, electrical contractors, refractory contractors, and so on. What may be an appropriate labour relations or labour supply approach for a general contractor may not be as appropriate for a specialty contractor. More recently, the prime or general contractor has given way to non-employer management contractors, who contract out all the work required to complete a project.

A diversity of contractors must work together effectively to complete a project. This historically resulted in far more contractors than there were unions representing their employees. Many, frequently small, employers had to negotiate with very large unions that were able to control the supply of labour and the timing of negotiations. Unregulated, this union power left employers open to labour disruptions, just at the time they needed employees for the jobs upon which they had or hoped to bid. Employers looked to each other for support, forming Trade Associations through which they could reduce their vulnerability by bargaining as one group.

In time, this led to more formalized systems of collective employer representation; in Alberta through multi-employer bargaining with organizations known as Registered Employers Organizations (REO's). While voluntary employer's organizations still exist elsewhere in the *Labour Code*, nowhere has multi-employer bargaining taken on the formality found in the construction industry provisions, now described in more detail.

Employers also chose to band together because they saw a common interest in achieving standard terms to apply within the industry. A settlement by any one major contractor can increase the bargaining pressure on all other contractors, and thus cost. Similarly,

(and this is a force towards multi-craft as well as multi-employer bargaining or at least coordination) a settlement by contractors collectively in one craft area can escalate costs for all the other craft groups.

What is Construction?

Legislation often has to define a term to limit its scope more precisely than its common meaning suggests. This report uses the term "construction" or "construction work" in two ways. First, it refers to the work done by construction tradespersons generally (i.e. the people with the skills). Second, it refers to a specific type of construction work done by employees employed by construction employers "engaged in the industry" (i.e. the context in which the skills are used). The prime purpose of this second and narrower definition is to identify contractors, unions and employees who may fall within the *Labour Code's* specialized Registration provisions. Registration is multi-employer bargaining with trade unions in respect of work within that narrower definition of construction. The *Code* defines "construction"²⁸, plus some related concepts, as follows:

"construction" includes construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include

- (i) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or
- (ii) maintenance work,

Part 3 of the *Labour Code*, which is headed "Construction Industry Labour Relations"²⁹ begins:

This Part applies to employers and employees engaged in the construction industry in respect of work in that industry.³⁰

The concept of "an employer engaged in the industry" is critical to the scope and purpose of Registration. First, "employer" is a defined term³¹

²⁸ s. 1(1)(5)

²⁹ This title is somewhat misleading since, with a few exceptions, it deals with registration but not non-registration construction matters, which remain covered by the *Code's* general provisions.

³⁰ s. 163(1)

³¹ s. 1(1)(n)

“employer” means a person who customarily or actually employs an employee;

An industry practice has grown up of establishing corporations to contract for services that, themselves, deliberately avoid becoming “employers” within this definition.³² The Labour Relations Board must often, and is given specific statutory power to, interpret these terms:

- (3) The Board may decide for the purposes of this Act whether
 - (a) a person is an employer, ...
 - (s) an employer is engaged in the construction industry or in a part of the construction industry,
- and the Board’s decision is final and binding.

The definition of construction excludes “maintenance work”. That exclusion has particular significance and is discussed in a separate chapter below.³³

The significance of this restricted definition will be pointed out in various places. For now, it is sufficient to say that most of what is being addressed here relates to employers and employees “engaged in the construction industry” not to those in other industries, for example, operating plants, who use tradespersons but only for their own internal purposes rather than to engage in the business of constructing projects for others.³⁴

Craft Lines and Jurisdiction

A construction project takes many different skills to complete. Much of the debate involved in the issues for this report stems from the fact that the large percentage of construction employees have and need craft based qualifications. By law or practice, they work in tasks associated with their own craft, not that of others.

Canada was once described as a country of “Two Solitudes”. In labour relations, the two solitudes are the “craft unions” and the “industrial unions”. Employees have a natural affiliation to each other based on common training, skills, and qualifications; their craft. Employees also have a natural affiliation to their co-workers in their

³² This is discussed in more detail below under the heading “The Breakdown in the Concept of Employer” in Chapter 7.

³³ See the Chapter 12 The Maintenance Industry.

³⁴ This is sometimes a debate whether an employer is indeed engaged in the industry, but it is not of great significance for the issues here. See the references in the LRB Information Bulletin #11, attached as Appendix 1.

workplace – the other employees of the same Employer. The less permanent the relationship with the Employer the less powerful this affiliation is likely to be.

Craft unions have a long history. Industrial unions are relatively more recent, emerging from the rapid growth of “production line” industrial enterprises where craft skills gave way to the performance of specific tasks as part of an integrated production process³⁵.

Craft and Industrial unions have had different interests and perspectives throughout labour history. The two main American trade union organizations; the American Federation of Labour (AFL) and the Congress of Industrial Organizations (CIO), since merged, were based on this. Today, in Alberta, most industrial unions are affiliated with the Alberta Federation of Labour whereas the craft based construction unions largely are not, affiliated instead through the Alberta Building Trades Council.

Industrial change has always presented a challenge for the relationship between industrial and craft unions. Some industries have undergone a gradual transformation from one to the other. One example is the railroad industry, where hundred year old craft allegiances gradually, over a painful period of 20-30 years, gave way to largely industrial style of labour relations.

In the construction industry, craft skills, craft qualifications, and craft unions remains the dominant characteristic of the industry. However, there are growing pressures towards an industrial model. The dialog is reminiscent of *“Men are from Mars - Women are from Venus”*. Each side has strong historical, political, or economic motivation for their position, but often each has difficulty understanding the other’s perspective. Each side has its myths about itself, and about the other.

A strong, and increasingly significant, difference between the craft based building trade unions and industrial unions is either Canadian nationalism, or a fear of the influence of the highly politicized state of U.S. labour relations. The building trade unions are all U.S. based International Unions. Many of the industrial unions in Canada have seen a significant shift away from past North American structures towards freestanding Canadian unions. For example, the UAW and the IWA both split into separate Canadian and U.S. entities (CAW and IWA-Canada).

The construction industry, as described already, involves workers in a steady stream of workplace experiences, with changing contractors and changing projects. It is quite natural then that employees might feel a stronger allegiance to their hiring hall and craft unions than to any particular Employer. However, this is not always the case. The

³⁵ This is often described as “Taylorism” after Frederick Taylor, the pioneer of “Scientific Management” and the “time and motion study” popular in the early to mid 20th century.

hiring hall system, almost universally, works on some form of rotational system for allocating work; the job board. This is not a seniority based system, but it is one that makes all persons “wait their turn” for the next available job.

With non-union construction contractors, an employee is free to apply and be hired without regard to a hiring hall list. The internet has had a profound influence through dedicated job sites like Workopolis. Virtually every contractor that does not rely exclusively on the building trades has a jobs section on their corporate website. This removes much of the tedium of the job search. The employee’s fate is more dependent on their relationship with the potential Employer. Some employees would rather rely on their own devices to find work, believing they will individually fair better than those waiting on a union hiring hall list. Each employee’s view of this may vary with the state of the economy, the other advantages of union membership, or simply personal disposition. Some employees simply do not care much either way until they are short of work or an issue comes up that affects them directly.

Employees in Alberta are trained through a combination of on the job apprenticeship and classroom training in their craft at institutions like NAIT, SAIT, or Keyano College. They emerge from such programs with craft based journeyman’s certificates. There are interprovincial standards in the Red Seal Program, which mirror the same craft based classifications.

There is a great deal of work which, by law, may only be performed by persons qualified to practice their trade. The reasons are obvious for efficiency, safety and quality control. However, this is not absolute. Some trades are compulsory trades, others not. On any construction site there are tasks that can be or need to be done collaboratively by composite crews. There are tasks that can be done by several different trades (simple welds, materials handling and so on). There are tasks that can be done either by a labourer or a trade apprentice (spark watch duties, for example). There are trades like ironworkers where one can take a broad or narrow view of an individual’s scope of work.

Craft trade unions have an interest in preserving certain work for their craft and their members. At times their interest is in maximizing employment opportunities, at times it is in ensuring there is work for apprentices to do during their learning years. At times it is simply the force of tradition. At times it is a legitimate concern for safety.

In significant part, discussions about competitiveness are just that, contractors competing against other contractors for jobs and for market share, unions competing with other unions and interest groups competing for industry or political influence. The language of this debate, however, reveals a few undercurrents worthy of note.

First, long-standing animosities in the construction industry lead some to assume any union is easier to deal with than the craft unions. This is partly due to history but partly due to assuming industrial unions are more pliable. That has not always been the experience of employers in the industrial sector. Second, not all unions are alike in their orientation. Third, there is the assumption that craft based divisions are all caused by craft unions and craft line organizing, whereas many restraints still come from apprenticeship and safety rules. Fourth, many craft based unions counter the argument that craft unions are less efficient by emphasizing the value added through union based craft training, to a degree not available elsewhere. Fifth, some of the debate attributes inefficiencies in the management of work and in the underlying engineering to the crafts themselves. Owners, particularly, recognize that much can be done to achieve efficiencies by better organization of how the work is directed as well as by whom it is performed.

Whatever the merits of the debate about craft based versus industrial style project management or union recognition now; historically, Alberta's construction industry was established on craft lines. The Unions were almost universally craft based and the industry operated on the basis of craft skills. The evolution of Alberta's labour legislation reflected that fact.

Jurisdictional Disputes

A problem, for many years, amongst the building trades unions and the Employers for whom their members worked, was the "jurisdictional dispute"; that is disputes between two unions as to which of their members was entitled to do a particular piece of work. Mostly, these issues were resolved at the pre-job mark-up meeting stage. However, some erupted once the job began, on occasion resulting in a work stoppage or at other times led to the employer's reassigning work in a different (and in the employer's view less economical) way just to keep jurisdictional peace.

Much of the past problems with jurisdictional issues were attributable to the breakdown in the dispute resolution system between the International Unions. Recognizing this, Alberta introduced s. 202 of the *Code* allowing the Minister to provide for an Alberta Impartial Jurisdictional Disputes Board and subsequently by issuing Regulation 2/2000, which provided a plan for the General Construction sector.

That plan has been in operation for many years now and is generally considered to have dramatically reduced jurisdictional disputes in the industry. In addition, the building trades unions have recognized complaints about jurisdictional problems in the past and

have worked collaboratively to avoid this, recognizing the impact on their competitive position. A relatively minor exception to this occurred in the early 2000's when a couple of parties³⁶ sought to use judicial review to challenge plan decisions, but the Courts in each case upheld the plan ruling and such challenges stopped.

The memory of past jurisdictional disputes lingers with some industry participants and supports their preference for all-employee style site management. However, the problems are generally conceded to have diminished to the point where few see them as a current problem.

Significance of Registration

At this point one might ask - why is a description of both the history and mechanics of construction registration legislation important? The reasons will become clear once the specific issues are addressed briefly in the next chapter and in more detail later. For now a couple of signposts may assist.

Registration was built and continues to operate on craft lines, and involves craft unions. The Coalition, but not the Alliance, wants the freedom and flexibility to operate free of Registration and on industrial lines. Operating free of the constraints of Registration has advantages for those who seek it; the contractors in the Coalition and the industrial style alternative unions with whom they deal, and the non-union contractors for whom Merit speaks. However, that advantage is primarily the ability to obtain work and market share that would otherwise go to those within the Alliance whose flexibility under the present system is restrained by the Registration system.

Almost everyone wants to see Registration remain in its present form, but perhaps for different reasons; some for the stability it has given and some precisely because it constrains their competitors while they compete free of those constraints. This forces a consideration of the public policy favouring Registration. Despite general support is it still useful and workable? Do some support it because it binds their competitors but leaves them free of restraint?

Two other broad considerations come into play. Currently Registration binds contractors who have bargaining relationships with the building trades, not those with alternative unions like CLAC or Unifor.

³⁶ See: Spantec Construction Ltd. and Ironworkers 720 and Boilermakers 146 [2000] Alta. Q.B. 744 and Labourers Local 92 and Carpenters Local 1325 [2003] ABQB 1059.

The choice of union representation lies with employees. How much leeway and influence should the interests of employers have in the choice of union representation, since that choice of representation (if any) determines whether that employer will be bound by Registration, or operate free of that system.

The second theme is that Alberta is now and will for an extended time be short of tradespeople. Competition is no longer just over price and efficiency; it is over the ability to obtain enough workers to reliably get the job done. One thing craft unions have traditionally “put on the table” as part of the deal for contractors bound by Registration is their ability to supply trained labour, drawing on their own resources and, when necessary, the resources from sister locals across North America. Some of the issues discussed below involve the extent contractors outside of Registration can draw on the traditional building trades labour pool when they wish to, or need to, without, by so doing, committing themselves to the building trade union and thus Registration. Not surprisingly both union and contractor members of the Alliance strongly resist seeing their own labour supply depleted by competitors who, in their view, seek the benefits without the burdens of a building trades relationship.

How Alberta’s Construction Legislation Evolved

Alberta’s construction legislation wasn’t just found under a rhubarb leaf. It developed, in a uniquely Alberta way, as a result of problems that were restricting industrial growth. Much of the push for specific construction legislation, and particularly for what we call Registration (other Provinces call it Accreditation) came from construction owners. In 1966, the Canadian Construction Association conducted a Canada-wide study on issues in construction labour relations. In October 1968 that culminated in what has since become known as the “Goldenberg-Crispo Report”.³⁷

At the time, several provinces, including Alberta, provided for voluntary Employer Association bargaining. Goldenberg-Crispo suggested more formal arrangements, allowing a majority of affected employers to elect an Employers’ Bargaining Agent with the power to bargain for the entire group. As the authors said, at p. 376, introducing the chapter “Countervailing Employer Power: Accreditation of Contractor Associations”:

Labour relations legislation in Canada is predicated on the assumption that countervailing power in employee-employer relations is a desirable public objective. To this end federal and provincial statutes afford workers the right to exercise their collective power through unions of their own choosing. A legitimate labour organization

³⁷ The formal title is *Construction Labour Relations*, Canadian Construction Association, H. Carl Goldenberg and John H.G. Crispo, editors, 1968.

which commands majority support among a group of employees may be certified as their exclusive bargaining agent. Their employer is then obliged to deal with it in good faith.

Concerted employer action for collective bargaining purposes is not, as will be seen, similarly protected and promoted by legislation. While in most provinces employers are free to organize and bargain through employer associations, no legal mechanism exists paralleling union certification which stamps the approval of public policy on such groups.

This report led to a spate of legislation, including, in 1970 in Alberta, the introduction of the initial Registration provisions into the then *Alberta Labour Act*. Early experience with Registration was less than satisfactory. Trade associations that had represented contractors in broader industrial concerns as well as in collective bargaining were reluctant to give up their bargaining role in favour of Registered Employers Organizations. Certain shortfalls in the legislation were also identified and corrected in 1972. The Dubinsky report described the amendments, which are still relevant today, because they provide part of the background to s. 176(1) (b).³⁸

In 1972, the Act was changed by Bill 79 to deal with the effect of National Agreements within the Alberta construction industry. The growth of construction in the Alberta petro-chemical industry had for some time seen a buildup of the presence of international and national contractors in the Province, most of whom are in the practice of signing National Agreements with certain building trades unions which have the effect of conferring voluntary recognition on such unions in return for the assurance of an adequate work force. As a result of the 1972 amendment, the law of Alberta makes it clear that any company which agrees to pick up or abide by any of the terms of a local collective agreement negotiated by a registered employers' association and a union, is automatically covered by the registration order, and accordingly is not legally permitted to extend the terms of other than such locally negotiated agreements to any construction project in which it may be engaged in Alberta.

This is still relevant in Alberta given s. 176 of the *Code* and the *Driver Iron* issue over the reach of Registration discussed in Chapter 11. In 1974, Bill 52 was introduced and adopted to create an exception to Registration for oil sands mega-projects, at the time particularly aimed at the Syncrude project. This is the predecessor to the current Division 8 discussed in Chapter 10.

The collective bargaining round in 1975 was particularly difficult. It involved the loss of 340,000 person days to work stoppages and involved settlements of between 35-42% over two years. In early 1976, the Construction Owners Association of Alberta (COAA)

³⁸ To a lesser extent, this is also relevant to the 1970 decision to exclude maintenance from the scope of Registration.

commissioned lawyer and labour relations specialist Murrey Dubinsky, Q.C.³⁹ to study Alberta's construction industry bargaining. In an insightful report, he made a number of recommendations to owners, contractors, unions and government aimed at strengthening the Registration system. He referred back to the rationale for Registration, quoting the Goldenberg-Crispo Report.⁴⁰

... the need for countervailing employer power in the construction labour relations field, and proposed special legislative and administrative provisions for the industry which would give rise to a form of contractor association accreditation analogous to trade union certification procedure. Their conclusions in this regard are summarized in the following extract from their study:

We have no doubt that a contractor accreditation scheme akin to that described is essential to securing a better balance between labour and management in the organized sectors of the construction industry. Nor have we any doubt that this in turn is the only way to bring about greater stability in industrial relations in this critical sector of the economy. At the same time we recognize that accreditation would bring with it a greater temptation and ability to engage in anti-competitive practices. It is our view, however, that this risk could be minimized by insisting on keeping the doors of both associations and unions in the industry open to qualified entrants. Assuming this is done, we have no hesitation in recommending the adoption of an accreditation system for contractor associations in the construction industry. Its enactment would provide a worthy challenge to the most imaginative legislator.

The Dubinsky Report included other recommendations that are still significant today. His recommendation 12, for contractors, read:⁴¹

12. That all employer bargaining groups within the Province avoid settling "out of phase" agreements which, in the absence of common expiry dates, perpetuate instability and imbalance in the industry's collective bargaining process.

In another passage, the author commented on the differences in Registration like legislation across Canada; this is particularly significant as it relates to British Columbia, which is sometimes held up as an appropriate model for Alberta to follow⁴²:

³⁹ Murrey Dubinsky, Q.C. is not to be confused with Alex Dubensky, Q.C., long-time labour practitioner, arbitrator, Chair of the LRB and sometime Deputy Minister of Labour.

⁴⁰ Dubinsky Report p. 11.

⁴¹ Dubinsky Report p. 3.

⁴² For a fuller and more current discussion of the differences see Adams, *Canadian Labour Law*, 2nd edition, particular Chapter 13.

The Alberta accreditation legislation differs markedly from that of other provinces in Canada. The Quebec law has the effect of unionizing the entire construction industry, ... At the other extreme, the British Columbia legislation permits an association to apply to be accredited as the bargaining agent for those of its members who consent to the application. Unlike the situation in other provinces, an accredited organization in British Columbia does not acquire bargaining rights for any employer outside its own membership.

Bargaining in the late 70's proceeded under Registration in most trades and sectors, but on a more local trade union jurisdiction basis not, in most cases, provincially. The end of the decade experienced a heated economy with rampant inflation, only to be followed in 1982-1983 by a dramatic downturn due, in the eyes of many, to the impact of the National Energy Program on Alberta's economy. The period between 1982 and 1988 proved to be a very difficult time for the industry as large contractors, in an effort to employ their capital resources and retain their key employees, bid on work they might previously have ignored, creating a ripple displacement effect throughout the industry.

The REO's tried to bargain some relief from the building trade unions, who refused rollback agreements. The REO's forced the issue through "one-day" lockouts, which led to protracted litigation. Employers also responded by looking for ways to escape the confines of Registration, primarily through various forms of "double-breasting"; that is operating through what were called "spin-off" companies. The leading, and at the time most controversial, case was *Stuart Olson Construction Ltd. v. Plasterers Local 924*.⁴³

Stuart Olson Ltd. was bound by Registration. The Company formed Stuart Olson Industrial Contractors Ltd. to seek work on a non-union basis outside of Registration. The new company had no direct employees and contracted for work through subcontractors, that later became known as "labour brokers". The LRB held, and the Court subsequently upheld, the view that each of the two companies sought to be bound by a common employer declaration must, of themselves, be employers. While the law was refined somewhat thereafter, this became the common model for operating in the industry, with many employers bound by Registration choosing to set up non-employer management companies and then bid and undertake work through that entity rather than through the principal company, which remained certified and subject to Registration.

This had a number of consequences. First, as the economic downturn dragged on, many building trade union members, often contrary to their Union's constitution or wishes, "tucked their cards in their boots" and accepted non-union work with these spin-off

⁴³ LRB decision 83-043, June 1, 1982, Mellors Vice-Chair.

non-union companies. Employees, then and now, have families to feed. Some unions tried to prevent this through discipline under their constitutions, leading to certain bad feelings over this on both sides.

Over this same period, much of the collective bargaining in the industry simply ground to a halt, initially due to the ongoing litigation and subsequently due to lack of work and attainable bargaining objectives. Employers successful in operating outside of Registration lost the motivation to engage in Registration bargaining.⁴⁴

By 1986-1987, the economy had recovered somewhat and efforts were made to reestablish collective bargaining within the Registration system. An election occurred in May 1986, just at the time of the Zeidler Forest Products/IWA strike and the MIOW strike at Suncor. Shortly after, the Gainers strike, combined with growing discontent within the building trades, led to a major demonstration in front of the legislature in favour of labour law reform. The new Minister, Dr. Ian Reid, announced the Government's intention to review the entire *Labour Relations Code*. However, a more specific review of construction bargaining took place parallel to but somewhat before, that broader review.

The *Construction Industry Collective Bargaining Act* was proclaimed in June, 1987⁴⁵, while the Review Committee was still travelling and meeting, about 10 months before the broader *Labour Code* amendments. It was designed to kick-start construction bargaining. It was automatically repealed following the introduction of the new *Labour Relations Code*.

There were fewer construction industry or union submissions to the Review Committee than might have been expected had the 1987 Act not been introduced. The Review Committee's formal report included only the following rather brief thoughts on Registration.

M. Registration

There are problems in construction sector bargaining with the current level of activity in the industry. Both employers and trade unions wish to retain registration in the long term for their industry and both express the need for a stable unionized segment of the industry in the industrial commercial field to assure availability of a highly trained and skilled workforce. This is in contrast to some attitudes the Committee heard in the U.S.A.

⁴⁴ For a detailed discussion of the boom to bust years see: Construction Labour Relations in Alberta, "Boom" to "Bust"; E.G. Fisher and Stephen Kushner, CIRA 1986, Annual Meetings, University of Manitoba and Alberta's Construction Labour Relations During the Recent Downturn, Fisher and Kushner, *Relat. Ind.* Vol. 41, No. 4, 1986.

⁴⁵ S.A. 1987 c. C-22.3.

where all parties recognize an oncoming severe shortage of skilled tradesmen within a decade but seem unwilling to work together to address the problem.

... The Committee did not consider its mandate to include “kick-starting” the process in the present environment but rather to address the long term needs of labour relations in the construction industry. If employers and construction trade unions are to bargain as equal partners, organizational structures and their functioning must be in balance.

Recommendations:

41. That the organizational structures of employers and trade unions in the construction industry be put in balance.

42. That the Minister of Labour advise the parties in the construction industry that unless they mutually develop a bargaining structure by May 1, 1987 a structure be established. Further, that the bargaining structure be Province wide and contain a majority rule principle.

It is the 1988 *Code* that put the “organizational structure ... in the construction industry in balance.” At the time, this meant the structure involving REO’s and the Building Trades Unions. CLAC had only a relatively small presence at the time and other alternative unions, while just emerging in B.C., were mostly strangers to Alberta. The structure of Registration, and more particularly of Registration bargaining as it emerged in 1988, follows.

How Registration Works

Registration allows employers operating in the construction industry, who must deal with a particular union, to choose their own “Employers’ Union” called a Registered Employers Organization. After they do so, following a Labour Relations Board supervised system to ensure majority support, the Union(s) can no longer deal with each employer separately; instead they must only bargain through the REO. Instead of a series of agreements, one with each employer, the Unions and the REO negotiate one collective agreement that applies to (or “binds” to use the *Code’s* terms) all the employers, with the same end date, and the same terms and conditions⁴⁶.

In the same way that certification, and a collective agreement, binds all employees based on majority support, the choice of the majority binds the minority of employers who

⁴⁶ There are some exceptions dealing with enabling provisions and project labour agreements, as discussed below.

must bargain with the union(s), even though they may individually have voted to maintain direct bargaining.

The Labour Relations Board, in 1986,⁴⁷ described the system and its ramifications for unions, employers, and competition (s. 54 is now s. 176).

The very essence of a registration system is that enterprises operating in the same market are by law bound to adopt a common bargaining position and advance that position through an agency entitled and obliged to bargain on behalf of them all. The collective agreements that result from this bargaining, by and large, involve wage rates that will apply equally to all those operating in that field of endeavor. It is a system that is mandatory. That is, by virtue of s. 54, it is a system that all contractors whose employees choose to be represented by the trade union in question, or to whom an employer has accorded a form of recognition (whether under 54(1)(a) or (b)) are bound to by operation of law. For those enterprises the element of wage rate competition has been removed in favour of a system of common wage rates, and common negotiating positions to which all are bound by law, through the agency of a Registered Employers' Organization. This statutory reduction in the available areas of competition was born out of an unsatisfactory system, where trade unions dealt with each employer individually, and used one employer to "leap frog" over another. Registration was designed to reduce the employer's vulnerability to union bargaining power, but at a price of reducing an employer's freedom to individually negotiate wage rates with the Union and thus to affect its competitive position.

The significance of the mandatory aspects of Registration to the issue of what makes "labour relations sense" in s. 133 is this. In an ordinary non-construction situation a company "spinning off" to a related corporate entity may result in a loss of bargaining rights for the trade union and its employee members, but it may only have a very minor affect on that company's competitors. In construction trades under Registration a similar "spinning-off" will enable an entity that was previously bound to pay the same wage levels as its competitors to suddenly under-bid those competitors, perhaps drastically. Construction companies are particularly vulnerable to such abilities, because their work is virtually always obtained by competitive bidding, and wages always form a substantial component of any bid. They are not only vulnerable, but immediately vulnerable. Construction contracts are often short term, and the loss of a bid is an immediate loss of work. Construction contractors simply do not have the long term supply contracts a manufacturer might have.

The upshot of this is that in considering whether to issue a s. 133 declaration under construction registration the Board must appreciate not only the bargaining rights of a

⁴⁷ *Ironworkers Local 720 v. Empire Iron Works Ltd.* [1986] ALRBR 167 at 193. This case was decided before s. 133 was amended in 1988 to specifically exclude non-employer corporations from common employer declarations, but the description of Registration remains accurate and was adopted in the *Driver Iron* decision discussed in Chapter 11.

union and its employees but also the commercial position of other employers bound by registration.

Having ventured into the realm of commercial reality, however, we cannot ignore the other feature of registration. While s. 54(1) (a) and (b) binds many contractors to a common bargaining stance and ultimately a common collective agreement and wage rate, it does not bind contractors who do not have a bargaining relationship, and those contractors too are competitors in the marketplace. They have always had that freedom to negotiate wage levels individually with their employees. They have the benefits and burdens of that freedom. In times of short supply they have difficulty recruiting skilled labour. In times of oversupply they can hire skilled labour at low rates and provide formidable competition. Not infrequently in times of scarce employment, it is the union employee who will accept work with the unorganized employer.

While the competitive position of the unorganized employer may ebb and flow with the economy and the supply of labour, the scheme of the Alberta Labour Relations Act, which we administer, does not. A registration collective agreement is binding on all s. 54 employers in good times and bad. If it was the Legislature's view that open wage competition between unionized construction employers was a desirable goal overall, in the present times, it would repeal or amend registration. It has not. With the retention of this system goes the need to maintain the integrity of the scheme of registration by ensuring that one contractor does not spin-off or redirect his business to a related employer not caught by an agreement so as to obtain an unfair competitive advantage over its fellow contractors. If an employer needs that competitive edge against unorganized competitors that edge must be obtained at the bargaining table or failing that by economic confrontation through a timely lockout.

We appreciate that no one contractor can insist on their position being accepted by the Registered Employers' Organization as its bargaining stance, let alone by the trade union. However, it is no solution to say that a contractor who does not like the agreement the Registered Employers' Organization and his fellow contractors have negotiated is free to set up another company as an alter ego and compete with those fellow contractors at reduced rates. *(emphasis added)*

This issue of the integrity of Registration and the competitive position of those bound by Registration vis-à-vis other contractors is discussed more fully in Chapter 11.

One might ask, in the world of free enterprise, why legislate such a system that binds many employers to coordinated negotiations and a common agreement. First, it is a system employers and owners asked for. The reason they did so lies in the particular vulnerability of an employer in a competitive industry. Without such a statutory framework, when employers voluntarily agree to bargain together, nothing prevents the union from settling with one employer, who is then in a better position to perform and

obtain work than its competitors. Similarly, the employer who holds out for more advantageous terms may find itself frozen out of work because others have agreed upon terms. Strikes may be staged sequentially so as to expose one employer after another to economic pressure. Collectively such practices have been described as “whipsawing” or “leapfrogging”.

Under Registration, employers are protected from such targeted union tactics, evening out the power imbalance between the large craft unions and the more diverse and sometimes smaller employers bound to bargain with that union.

One very important effect of this multi-employer bargaining is that the collective agreement expires at the same time for all employers, and by legislation, for all trades. Section 183 requires this by setting the date at April 30 each odd numbered year. A construction site is particularly vulnerable to serial strikes or lockouts, since a shutdown in one trade can disrupt the work of others. This is not just due to picketing, although that is a major factor. It is also due to the fact that most trades are interdependent; you can't paint a wall that's not built and you can't weld 80 feet up without a scaffold.

Creating a common expiry date also aligned the open periods for certification or revocation, a topic discussed below in relation to both Division 8 agreements and to construction bargaining outside Registration.

The amendments brought in in 1987-88 realigned Registration bargaining so that it became province-wide, instead of based on the territorial jurisdiction of each of the unions. This move to a province-wide structure plus some modifications to voluntary recognition explains the addition of s. 176(2) of the *Code*. When more than one union local operated within a craft in the Province, this realignment required them to bargain as a “Group of Trade Unions.”

An option discussed both in the 1970's and in 1988, but rejected for Alberta, was to create all-craft single-table bargaining. A former Chair of the B.C. Board Paul Weiler described the difference in approach:

The real issue, the one which we had to address in British Columbia, is whether the structure of bargaining should simply be extended at the trade level, or whether it should encompass all of the trades operating in building construction. In British Columbia we forthrightly embraced the multi-trade model (in sharp contrast with recent reforms in Ontario and Alberta for instance). (*emphasis added*)

The B.C. Construction Labour Relations Association [CLRA] came into existence in the late Sixties because of a desire not just of contractors but of the employers' community as a whole to put construction bargaining on a multi-trade basis.

The solution to that problem is apparent: multi-trade bargaining. The negotiating structure in construction should be designed so that an industry-wide view can be taken of the cost of contract settlements and the economic impact this is likely to have on new construction projects by potential purchasers. It is undeniably true that the contract settlement in any one trade, in any one slice of construction, ripples throughout bargaining in every other segment of that industry, as a target to match or even to better. That fact of life must be reflected in the design of the bargaining structure. All of the employers who are bargaining in that industry should be brought within the umbrella of a single contractors' association in which a realistic appraisal can be made about the likely overall impact of concessions made to any one trade.

B.C.'s choice for multi-employer bargaining was thus multi-craft but voluntary. Alberta's, in contrast, was craft by craft bargaining (although coordinated) but mandatory.

How Registration Bargaining Works

The construction Registration bargaining cycle established in 1988 is best understood in the context of the problems it was designed to address. Strikes and lockouts in the past had resulted in several shutdowns, with a strike by one trade disrupting projects for employers, owners and all other trades. Sometimes one union would try to lead the pack with an early and militant bargaining stance. At other times, a union would hold out for "a bit extra" once the bulk of the trades had settled, again disrupting the industry including all the settled trades.

The Government considered, and rejected, adopting the B.C. Model of an all-trades province-wide bargaining system. Rather, it chose to leave each trade in each sector, and the Employers through the now province-wide REO's, to bargain their own collective agreements, but subject to industry-wide coordination and subject to several new restrictions on when and how strikes or lockouts could occur.

First, it set a statutory bargaining cycle, with expiry dates set by law, at April 30th each odd numbered year. By this mechanism, all Registration agreements would come up for renewal at the same time.⁴⁸ This aligns not only the bargaining but also the window periods when notices to bargain can be given and when employees can decertify or a different union seek certification.⁴⁹

⁴⁸ The Board has since accepted four-year agreements.

⁴⁹ This feature is significant to several issues discussed below. The Board, in *Westbrook Electrical Services Ltd. v. CIAC Local 65 et al* [1991] Alta L.R.B.R. 56, held this mandatory expiry date in s. 183 only applied to Registration agreements.

Second, the new legislation divided the unions and REO's into "parts of the construction industry" based on "trade jurisdiction" (craft lines) and "sectors" (general, pipeline, road building and specialty). Bargaining would take place between the REO and the "Group of Trade Unions" (combining the various locals in each trade) for each registered part of the industry.

For each round of bargaining, the Labour Relations Board holds a hearing and decides on a "Consolidation Order". This order requires that any strike or lockout must and can only involve all the unsettled disputes in each consolidation. The groups are picked, as far as possible, to reflect when each trade is likely to be on a job, thus minimizing the disruption a stoppage might cause to other non-striking or settled trades.

The trades and REO's each bargain individually, but cannot strike or lockout until after a Labour Relations Board supervised vote amongst the employees or the employers. No vote will be conducted until at least 60% of the groups of unions or REO's grouped together in the consolidation order apply (excluding those already settled). Effectively, this means no strike or lockout can legally occur until a significant number of trades have been through serious bargaining and have reached an impasse.

For a strike vote to carry, 60% of the employees overall must be in favour of strike action. In addition, a majority of employees in each of 60% of the trade union groups must also support strike action. This double majority test ensures that any such action has broad industry-wide approval. It also balances the influence of the larger and smaller trade unions in making that decision. The same majority vote rules apply if employers are polled over proposed lockouts. If double majority votes are reached, all the parties in the group set out in the consolidation order must and can only strike or lockout at once, although thereafter each trade can settle separately.

The last feature of this complex and finely balanced system is that once 75% of the REO's and Groups of Trade Unions have settled their agreements, any remaining disputes are settled by an arbitration like mechanism called the Construction Industry Disputes Resolution Tribunal (CIDRT). Customarily CIDRTs look to the pattern of settlement arrived at by the 75% of the trades in the sector that are already settled.

Why such complexity? The answer lies in the need to preserve the ability to strike or lockout where bargaining or market forces make it unavoidable, but to keep the pressure for compromise on the entire industry so that, as far as possible, that pressure will lead to agreements. There is no remaining ability for one group to "lead the pack", and no incentive to any group to "hold out for something extra". The strike-lockout formula recognizes both trade specific interests and the interdependence between trades.

Despite this complexity, the system has worked. While there have been several CIDRT proceedings to arbitrate unresolved disputes after 75% were settled, there has not been a single strike or lockout under the system for 25 years. Some attribute that to the system or to the common understandings and relationships built up between Employers, REO's and Unions. Some attribute it to the growing competitive influence of the alternative union and non-union players in the industry. There is perhaps some truth to each assertion. However, what is clear is that Registration bargaining, over an extended period, has achieved remarkable success, within this framework, in resolving bargaining issues within the REO-Building Trade portion of the industry.

The Wider Influence of Registration Agreements

Whatever has caused the continued success of Registration bargaining, and whatever the exact percentage of each market or sector it commands, one fact remains true. Registration bargaining sets a highly influential benchmark for construction industry rates and benefits. It does the heavy lifting for a much wider construction labour market.

The first area where it does this is in respect to the maintenance industry. Maintenance agreements, while they include some terms and conditions specific to that industry have, for as long as Registration has existed, picked up most of the rates and working conditions for the Registration agreements. Sometimes this is a direct pick-up, sometimes it has been based on a ratio or similar formula. Nonetheless, the reasons the unionized maintenance industry has been essentially strike and lockout free for over 60 years is its reliance on the province's Registration agreements as a benchmark.

A similar influence, although often less directly tied, is the influence on craft union-employer bargaining over agreements in the quasi-construction industry; fab shops, service and repair shops, modular yards and so on.

Another influence is on bargaining in Saskatchewan, where the size of the construction labour force is much smaller, but still significant. Saskatchewan tradespersons assess what they are willing to work for with reference to what they can earn in Alberta should they get in their pick-up trucks and drive to Cold Lake, Edmonton or Fort McMurray. With the advent of fly-in fly-out arrangements, this influence is extending across Canada. As Alberta imports workers from other jurisdictions, the labour markets in those jurisdictions; Ontario, B.C., and Newfoundland particularly, are influenced by the rates Alberta employers are able and willing to pay.

In times of short labour supply, Registration rates have gradually become market rates that those contracting with employees directly or through alternative unions have to come close to meeting. While working conditions and benefits still vary, the spread between Registration rates and alternative union or non-union rates has narrowed, particularly in the industrial construction arena. Registration rates do, to a lesser degree, set a benchmark for that bargaining as well. This function cannot be ignored, even if Registration's market share is significantly lower than it once was.

Chapter 6 Proposals, Principle and Interests

The construction industry has changed since 1988, due in part to reasons described in the next chapter. The statutory framework has remained much the same. During that period unions and contractors have pushed for change. Cases have been advanced, before the Labour Relations Board, to test the *Code*, particularly in relation to Division 8, certification and voluntary recognition issues, and the scope of Registration. As well, campaigns have been mounted at the political level for specific changes, notably the 2003 push for so called “Right to Work” legislation, the successful 2008 push for Salting and MERFing provisions⁵⁰ and the proposals advanced by the Coalition in 2011.

Successful litigation advances a party’s interests; unsuccessful litigation the reverse, and sometimes leads to calls for legislative intervention. Topics now advanced are intimately linked to Labour Board and Court decisions and can only be fully understood in the context of those cases. Most proposals involve issues where conflicting interests have already been raised and litigated. Subsequent proposals cannot be divorced from the contrary views expressed in the cases from which they emanate.

The background to these proposals must be assessed in this light; as freestanding issues to be assessed on principle, but also as issues that have arisen as a result of a prior clash of interests. This clash of interests is primarily, but not entirely, between the building trades unions and the contractors who are bound by Registration on the one hand, and the contractors who wish to compete for the same work, and the unions, if any, with whom they bargain, on the other. Unlike the past, this debate is no longer unions versus contractors. Instead, it is between two groups of contractors with different interests, each with their union affiliates.

The non-building trade contractors believe they can compete effectively, but that they will lose that ability if they are certified by a building trade union and, as a result, become bound by Registration. They allege that the REO-building trade union participants have the statutory and board policy rules “tilted” in their favour. The building trade unions particularly see most of the positions advanced by the Coalition as building blocks in larger “raid proofing” schemes. They see a system having been built up, strategically over a series of cases, that effectively preclude building trade unions from organizing employees, or, if able to do so, preclude their ability to negotiate anything useful on behalf of those employees.

⁵⁰ The Salting changes involved the introduction of s. 34.1 of the *Code*. The MERF provisions are in sections 148.1 and 148.2.

The Alliance emphasizes, in several ways, that Registration has worked for almost 25 years. The manpower performed under Registration agreements has grown from 25,000 hours per month in 1992 to its current rate of over 250,000 hours per month. It is an integrated successful bargaining system, which has resolved disputes for a very large portion of the industry without disruption. The Alliance goes on to say of the Coalition proposals:

But our stability is fragile. Instability was introduced by the *Driver Iron* arrangement through which an international union chose to solve the workforce challenges of our contractors' competitor, at terms more favourable to and less binding upon that competitor. The potential for instability would be introduced by each locus of bargaining that might be introduced outside of registration bargaining, such as uncoordinated and non-integrated project bargaining, maintenance negotiations, negotiations with newly organized contractors, and so on. Each of the proposals for dis-integration of our bargaining regime would have the effect of introducing instability and the likelihood of work disruptions. Each of these proposals would have the potential to return us to the pre-registration chaos, prospects for whipsawing and leapfrogging, disharmony, stress on working relationships, and destroy alignment on larger industry objectives.

The building trade unions, in their various briefs, oppose several of the Coalition proposals as efforts to bolster or restore the "raid proofing" strategies they say have been used by employers affiliated with the PCA and the Coalition. They say this particularly about the "all-employee unit" proposal, the complaints over the build-up and early renewal restrictions, and the proposal that certification should be ineffective to alter any existing commercial agreement. Summarizing and paraphrasing those submissions, what they are saying is essentially this:

Companies outside of Registration, primarily in the commercial sector, have grown to where they believe they have the capacity to compete for work in the Heavy Industrial sector.

In the late 90's and early 2000's owner attitudes changed due to cost overruns and delays. They became increasingly open to alternative ways of doing business. With a Suncor project in 2003 and the CNRL project being planned at the same time, they saw opportunities to break into the market for heavy industrial work.

There are risks associated with this line of work. It requires a large and reliable supply of highly trained labour to complete such projects. In a time of labour shortage, this is a challenge for all contractors and unions. The ability of these contractors to successfully bid and win contracts depends, in their view, on their not becoming bound to the Registration agreements under which their competitors operate.

Union organizing on a major industrial site can itself be disruptive. However, in the union's view, most of the complaints on this score are exaggerated and are, in reality, a cover for a more basic aversion to building trade organizing, the potential that it may be successful, and the binding effect of Registration when it is. "Raid proofing", as the building trade unions describe it, means the several strategies developed to overcome the risk of building trade certification and thus becoming bound by Registration.

The first step is to operate through a nominally arm's length company, often using an affiliated non-employer management company (that cannot, by definition, be certified) that contracts for the employees through some form of labour broker. If such brokers are certified they can readily be replaced.

The second is to encourage, or not discourage, a union that is not bound by Registration to represent the employees in question and to negotiate a collective agreement that binds them.

A contractor with a non-building trade union relationship and collective agreement is protected against building trade organizing in a way that non-union employers are not. A non-union employer can be the subject of a certification application at any time. Where a collective agreement is in place with an alternative union, organizing is restricted to the two months open period, essentially barring organizing for 22 months.

Once a non-registration bargaining relationship (with an alternative union) is in place, any pending open period can be closed off by negotiating a renewal to the collective agreement, earlier than the scheme of the Code anticipates, relying on that renewed collective agreement as a renewed bar to any subsequent certification application by a building trade union.

The building trade unions claim that the vast majority of certifications involving alternative unions have involved tiny groups of employees signed up well before the employer genuinely started operating, thus denying the intended workforce any real opportunity to choose whether they wanted representation and, if so, by which union.

The current labour shortage means that contractors are competing for certain trades. Doing so means that, for some projects, deals have to be made with parties under Registration. To the extent that trades persons from the building trades are employed as a result, the risk of building trade union certification increases.

Over the last 10 years or so, many cases have raised issues that affect Registration or the way non-union or alternative union contractors co-exist and compete with contractors

under Registration. While there have been dozens of such cases, mostly involving preliminary skirmishes, three are at the core of the current differences. They are *Firestone Energy Inc.*⁵¹, *Driver Iron Inc.*⁵² and the various actions surrounding the Division 8 approval for CNRL⁵³.

Firestone raises several issues about certification, early contract renewal, preferential relationships between a contractor and a union, and open periods. In *Driver Iron* it was asserted that, by only recognizing the Ironworkers Union Local 720 to a limited extent, an employer could employ Ironworkers from that Union without becoming bound by Registration. The Labour Relations Board held that the proposition was wrong. The matter was only resolved, 6 years after the practice began, when the Supreme Court of Canada upheld the Board's decision. Doubts still remain due to the continuing willingness of the Ironworkers Union (although not Local 720) to supply Ironworkers, still outside the scope of Registration.

The litigation over the CNRL – Division 8 approval raised how Division 8 can operate under a “managed open site” concept. It raised the degree to which, to negotiate a Division 8 agreement, a trade must be more than just a trade union, but also a “bargaining agent” representative of employees. This question in turn raised Charter of Rights – freedom of association issues.

While these three cases and the proposals to which they are now connected must, of necessity, be examined separately, they are in fact highly interdependent. They all came to a head at much the same time and involved many of the same players.

As an overview, this is about one group of contractors seeking to break into a fast growing area of work previously performed by another group of contractors. The existing group, bound by Registration and certified to the various building trade unions, wish to keep the work as do their union partners.

Some believe (passionately at times) that this new competition is a healthy thing. However, competition in this industry carries the risk of inter-contractor and inter-union leapfrogging. In the past such competition justified adopting the Registration system, described above.

The contractors that have now broken into the industry wish to stay out of Registration. However, they lack the manpower capacity, in some trades at least, to complete the work and that problem could get worse. Any employer wish to “stay out of

⁵¹ [2009] ALRBR 134

⁵² [2009] ALRBR 26

⁵³ Discussed in Chapter 10.

Registration" challenges the statutory right of employees to choose (or not choose) their own bargaining agent. It also challenges the proposition that employers must not take an overly intrusive role in representation questions.

To what extent do these competitive forces challenge the basic tenants of the *Code's* representation system or its registration system? To the extent they do, have competitive advantages been gained by avoiding the *Code's* restrictions? To the extent of a conflict with the *Code's* fundamental principles, should the *Code* (or the way it has been interpreted) be altered to accommodate these changed circumstances and ambitions, and if so, how?

Specific Coalition Proposals

The first title in the Coalition's initial submission "Creating Economic Advantages through Cost Certainty" is seen, by some, as challenging the whole purpose of collective bargaining. Collective bargaining is about adjusting wages through negotiation. If cost certainty simply means the elimination of any effective negotiation process, then they oppose it on fundamental principle. Further, they argue, cost certainty in terms of labour costs is in any event something of a myth given the market forces of supply and demand, and most particularly the looming labour shortages. It is under this heading that the Coalition proposes three changes.

Clarification of Division 8 of Part 3 of the Code

The Coalition argues that Division 8 has objectives that are beneficial to mega-project development. However, potential users are currently hesitant to use Division 8 because of the risk of litigation. They say rewriting the section could open up greater opportunities for its use.

Coalition Recommendation: Amend Division 8 to clarify and improve the language of these sections in order to improve the utilization of this Division.

The context of this is that CNRL tried, through the use of Division 8, to bind the building trades unions to a blanket agreement negotiated with CLAC. It was this strategy, in the view of the building trade unions, rather than Division 8 itself, that caused the charter litigation and caused any chilling effect on the use of Division 8. Underlying this strategy, and the litigation and negotiations that followed, is the reality that a mega-project can only succeed, in times of labour shortages for key trades, with the use of various sources of supply. A complex mega project cannot be completed without some

of the building trades, and possibly cannot be completed using only the building trade unions.

Further context arises from the REO's and the building trades, in their recent negotiations, having agreed to a voluntary protocol for protecting mega project development in the form of "Special Project Needs Agreements". Division 8 is discussed in Chapter 10. To the extent the Division 8 proposals seek to include maintenance, they are discussed in Chapter 12.

Continuation of Collective Agreements

The Coalition proposal asserts that, in the construction industry, when a union is certified and there is an existing collective agreement in place, the incoming union can terminate that existing agreement on short notice and the contractor may become bound to a new collective agreement with very different terms, leaving the contractor subject to different labour costs. This, it is argued, can be financially devastating for the contractor. In contrast, in British Columbia, the incoming union cannot terminate the existing collective agreement and employers are spared this economic risk.

Coalition Recommendation: Adopt legislation similar to that in British Columbia.

The Building Trades Unions emphasize B.C.'s entirely different legislative framework. In Alberta, if the incoming union is not a building trade union, any change to the agreement is subject to direct negotiation, and any subsequent agreement requires the employer to agree, in the same way as any newly certified non-construction employer. The proposal is really, they say, to repeal the effect of s. 178 of the *Code* which binds employers to the existing Registration agreement once certified. This issue is dealt with in Chapter 11.

Completion of Work under existing terms

The Coalition similarly argues that:

... where a building trade union certifies a contractor's employees, the contractor automatically becomes subject to a collective agreement without any opportunity to influence the terms of such agreement. As a result, the contractor could find itself subject to very different labour costs. This, too, could be financial devastating for an employer.

Coalition Recommendation: Amend the *Code* to allow such employers to complete existing work under the labour obligations that existed prior to the new certification.

The building trade unions view this proposal in the same light. Generally speaking, a contractor cannot attract labour except at current market rates so, in their view, the reference to financial devastation is hyperbolic. Further, since "employers" are routinely being created for a particular job, and are easily replaced, this proposal too is simply to avoid the binding effect of Registration. Those under Registration argue that any company taking on a contract at sub-market rates does so by underbidding those competitors for the job who are bound by Registration. A contractor in such a position is forewarned of the risk of either certification or of the escalating labour costs that will be needed to complete the work. This issue too is addressed in Chapter 11.

The Coalition brief's second theme "Creating Bargaining Structures for Today's Workplace" implies to some that the past structures are out of date, and that all construction workplaces have changed significantly. However, they propose a dual system, allowing all-employee construction bargaining units to co-exist with trade specific units; essentially to allow a craft based model and an industrial based model to operate together and, implicitly, to compete. The three specific proposals are:

Allowing for All Employee Units

The Coalition's position is that the current Labour Relations Board policy is outdated in that it:

... grants certificates in the construction industry using a system which divides the workforce, and the certificates, according to traditional trades (carpenters, labourers, etc.). This system accommodates "registration collective bargaining" that applies to Building Trade Unions and their contractors, but the system does not reflect the current realities concerning industrial-based unions and their contractors. It also fosters segregation of the workforce and undermines the productivity of the workforce.

Coalition Recommendation: Amend the *Code* to allow for certificates in the construction industry that cover all of the employees working for an employer.

This proposal was put forward about the same time as CLAC brought applications before the Labour Relations Board to certify two bargaining units on an "all-employee" basis. Those applications, adjourned pending this review, pitted the Employers and CLAC against the building trade unions and the CLRa in what was likely to be long,

certainly expensive, and perhaps inconclusive litigation over the merits of the craft versus industrial models of organizing.

Underlying this are important process questions. If such a change were made, could building trade unions also organize all-employee or multi-trade units outside of the reach of Registration? Or, if such organizing were to be caught by Registration, how would that work? If a workplace was organized on an all-employee basis, could the employees ever, thereafter, choose to go back to craft based representation? If not, it could be a one-way process that, over time, would undermine both the building trade unions and the Registration system in its present form. These are important public policy issues. However, they are also very difficult issues technically. These issues are addressed in Chapter 13.

Early Renewal of Collective Agreements

This proposal arises directly from the Labour Board's *Firestone* decision, upheld by the Court of Queen's Bench⁵⁴. The Employer and the Union had a collective agreement. That agreement's end date would have allowed an application for certification or revocation during the upcoming statutory window period. The Employer and the Union agreed to renew the agreement before that window period opened up. Some steps, found inadequate, were taken to ratify the new agreement. The Labour Board found that the Employer's involvement in this early renewal process was an unfair labour practice – motivated by a wish to “raid-proof” its workforce. Further, the *Code* was interpreted to mean that such an early renewal cannot in any event close off the statutory open period.

The Coalition asserts that this prohibition on closing the statutory open period:

... will require employers to amend their business practices and will undermine labour stability and cost certainty in many industries.

Coalition Recommendation: Incorporate the pre-*Firestone* state of the law into the Code.

The building trade unions see this as an effort to reverse *Firestone* and reestablish the “raid-proofing” described and restrained by that decision. They oppose this by raising the entirety of what they see as a growing and inappropriate “raid-proofing” strategy that involves premature certifications, followed by contract lengths and early renewals

⁵⁴ *Firestone Energy Corporation et al* [2009] ALRBR 134 upheld [2012] ABQB 540. Appeal filed but withdrawn.

designed to eliminate any opportunity for employees to choose different representation, either at the outset or at any time while the work is still being undertaken.

Incorporating Approach to Build-up Principles in Construction into the Code

Comments in *Firestone* disparaged certification applications brought before the start of any real project work. In other industries, premature certification is prevented by the “build-up” principle, which precludes certification at a time when the workforce is unrepresentative. Historically, the Board has not applied this to construction. The comments in *Firestone* suggested this policy might change if used as a vehicle for “raid-proofing”. The Coalition, referring to “the no build-up policy in construction” as a long-standing practice, argued:

This practice allows the LRB to grant certificates in the construction industry notwithstanding the variability in the size of a contractor’s workforce over the course of a project. If that practice no longer applies, there is a greater risk of a high cost of labour disruptions in the construction industry and litigation before the LRB.

Coalition Recommendation: Incorporate the long-standing practice into the Code.

Those opposed to the proposal again rely on the entire “raid-proofing” debate dealt with in *Firestone*. The build-up concept also arises in a second way. When British Columbia opened the door to “all-employee” certifications in the construction industry, it did so subject to applying the build-up principle, precisely to avoid the difficulties the building trade unions now assert. It specifically warned that it would be less sympathetic to “top-down” organizing.

The Coalition’s third heading is “Improving Fairness for Employees and Employers”. One proposal seeks to limit the use of union dues. It is an issue with implications throughout the *Code*; well beyond construction. It is highly controversial and beyond the scope of this review. Two others are matters subject, of necessity, to ongoing regulation and adjudication by the Labour Relations Board, one relating to picketing and the other to Market Enhancement Recovery Funds. Two remaining Coalition proposals are:

Restricting Union Fines

The Coalition argues that the *Code* insufficiently protects persons from the enforcement of union constitutional prohibitions against working non-union when union work remains available.

Coalition Recommendation: Amend the Code to prohibit unions from fining their members when the member simply works for its employer of choice.

Those opposed to this point out that it seeks to reverse the Court of Appeal decision in *Armstrong v. Boilermakers*⁵⁵ a case which upheld the Board's application of the legislation as it presently stands. Further, it is argued that this has to be seen in the context of a short labour supply. Employers without an agreement with the building trades may face insufficient sources of supply for some trades. Those with agreements suffer from the same shortages. Unions as well as contractors under Registration have a legitimate interest in ensuring that union members remain available to meet their existing supply commitments to their signatory employers.

Effective Appointments to the Alberta Labour Relations Board

The Coalition asserts that:

The practices and procedures to appoint Chairs, Vice-Chairs, and other members of the LRB do not facilitate balanced representation on the LRB.

Coalition Recommendation: continued diligence is required by the Minister of Employment and Immigration to ensure that the Labour Relations Board consists of members who will reflect the legislature's policy intentions.

This issue is dealt with in Chapter 14.

Broader Mandate and Specific Proposals

These specific proposals, briefly described in the contexts from which they have arisen, must be assessed within this review's broader mandate which includes the twin goals of competitiveness and a stable construction labour relations environment. The Government specifically gave a mandate for the examination of:

⁵⁵ [2010] ABCA 326

- The system for certification and related processes for bargaining units in construction and related industries. It will include appropriate bargaining unit configurations and the protections and procedures necessary to ensure the certification and bargaining system provides an appropriate balance for employees, unions and employers within and outside the scope of registration.
- The Construction Registration system and how it co-exists with those parties outside of the registration system.

The Alliance particularly urges that several proposals are designed to and will, if implemented, significantly undermine the *Code's* Registration system to no advantage. This requires an assessment of that system as it exists, the advantages it has and still offers, its influence on competitiveness, and how all this might change.

Again, these are not employer versus union conflicts. They are conflicts between employers who still choose to or are bound to operate within the Registration system and those who operate outside that system, recognizing that some do both.

The proposals that involve an employee's choice of union have to be assessed against the allegations of "raid proofing" strategies as shown by past experience and by assessing any future impact on one of the *Code's* basic principles which is that employees, not their employer, have the right to choose or change bargaining agents.

The next chapter explores some of the significant changes that have indeed occurred in the labour relations environment. The chapter following that asks - On what basis should factors like competitiveness and stability be assessed? Thereafter, the report moves on to the specific issues outlined above.

Chapter 7 Changes in the Industry

The last substantial rewrite of the *Labour Code* occurred in 1987-88. The Labour Relations Board undertook a major Construction Bargaining Unit review shortly thereafter. The make-up of the industry has changed since then, although it has done so with a very low rate of labour unrest compared to other jurisdictions, and it has done so within the *Code's* existing framework.

The proposals for change have the potential to alter that framework, in the name of enhanced competitiveness, increased cost certainty, modernity and fairness. Their analysis requires an assessment of whether the proposals, and the interests that are affected by them, justify statutory change.

This chapter reviews six changes that have already occurred in the industry as a prelude to assessing the options. These are:

- The Breakdown in the Concept of the Employer
- Unions of Convenience
- Changes in Owner Attitudes
- Hiring Hall, Benefit Plan and Pension Alternatives
- The Merit Shop Movement
- Changes in the Union Environment

The Breakdown in the Concept of "the Employer"

The common assumption is that an employee works for "an employer". Our labour laws assume that such a relationship exists. In the construction industry, this has always been a little strained, given the role of unions and hiring halls, and the hierarchy of relationships, legally and on-the-job, between the owner, the general contractor and subcontractors. While the shell of "the employer" still exists, it has become a bit like the cat in Alice in Wonderland; all that is left is the smile.

There has been a shift in corporate organization. The company, and indirectly the employer, has been replaced by "corporate structures". Increasingly, corporations, public and private, use matrixes of smaller inter-related organizations. Some of this is done for reasons of risk management or taxation. Some of it results from corporate takeovers of different enterprises, or operating in different jurisdictions or sectors. Some of it however, is done to insulate the "corporate structure" from labour relations consequences.

With modern technology it is now possible to run, and easily account for, many entities within one corporate family. It used to be too awkward and expensive to operate this way, but that is no longer so.

Some of this corporate reorganization for labour relations purposes began in the period following the 1982 economic downturn and the *Stuart Olson* decision. It led to the creation of many subsidiary "management companies" that would contract for work, but complete that work by using employees recruited and paid through a labour broker. Labour brokers are not, customarily, at least, owned by the "corporate structure"; rather they work on contract with the broker paying the wages, but then reimbursed for those wages, plus commission in some form, from the management company. Such contractual arrangements can easily be replaced, since the value they add is relatively inexpensive and easily replicated. The facts in *Firestone*⁵⁶ illustrate the type of relationship that often exists.

[31] Firestone is not actually owned by Flint. Its owner is one Richard Klinger of Lloydminster. Flint has no ownership stake and there are no common officers among Firestone and the Flint companies. There is a relationship, contractual and perhaps informal as well, between them ... Flint had acquired one of Mr. Klinger's other companies, and that Mr. Klinger had for a time been on the Flint payroll. Firestone has offices in Sherwood Park at the same address as Flint's offices there. Flint and Firestone had also entered into a service agreement whereby Flint provided payroll, human resources, accounting and other functions to Firestone. It did emerge in cross-examination that throughout the events of this case, it remained within Flint's power to "use" Firestone ... or not as it saw fit.

... Firestone acquires work only intermittently, and when it does it is at the behest of decision-makers in the Flint organization like Mr. Olmstead, Flint Division Labour Relations Manager Jason Beaman, or their superiors.

... We heard of no action by Firestone during this time that was not attributable to managers in the Flint organization.

We ... conclude that, for purposes of this case, Firestone is an *alter ego*, a "Flint company" as if it were owned outright by Flint. These reasons sometimes use the formulation "Flint/Firestone" to recognize the *alter ego* relationship, and any reference to Firestone should be read with the recognition that Flint supplied its guiding minds.

[33] Firestone's place in the Flint organization is as an entity having bargaining relationships with CLAC that can be engaged when it suits Flint's operational purposes.

⁵⁶ *Firestone Energy Corporation et al* [2009] ALJRB 134 and para. 31-33.

This is just an example. Many such relationships exist between parent corporations and their subsidiaries, including “management only” non-employers, and more or less loosely affiliated “labour brokers”. The Board in *Firestone* also observed⁵⁷:

... [a] feature of the construction industry to note is the preponderance in that industry of families of related corporations. Flint is not unusual in that respect. Though enterprises operate through groups of related companies for a number of business reasons like minimizing tax exposure or limiting liability, it is also the case that some construction enterprises operate multiple corporations out of labour relations considerations. Thus, one enterprise can have companies standing prepared to do project work on a non-union, alternative union, or sometimes building trades union basis depending upon the nature of the bid process or other business considerations.

... the prevalence and ease of subcontracting, and the ease of moving assets from company to related company, in this industry. The construction industry is relatively open and unrestricted by the need for massive capital outlays and standing workforces that exist in other industries. Unless the facts are such as to attract a Labour Relations Code prohibition or a contractual prohibition, it is uncommonly easy for an enterprise to change the corporate vehicle doing the work:

It is this increased fluidity in inter-corporate arrangements, plus the impact of s. 192(3) of the *Code* that allows Employers to operate in a “double-breasted” or even “triple-breasted” fashion. That is operating through one corporation under Registration, through another contracting with a third party that has a bargaining relationship with an alternative union, or through an entirely non-union contracting arm. Part of the common employer section 192(3) reads:

(3) Notwithstanding subsection (2), if a trade union makes an application under subsection (1), the Board shall not make a declaration under subsection (1) in respect of a corporation, partnership, person or association of persons that does not employ employees who perform work of the kind performed by members of the applicant trade union.

These corporate abilities, of course, are subject to the ability of the employees, once hired by whatever corporation, to choose or change unions. This corporate flexibility leads some building trade unions (although only a minority) to ask why they too cannot “double-breast”, operating inside and outside of Registration, as suits their interests.

⁵⁷ *supra* at para. 222-223

Unions of Convenience

In the late 80's and early 90's, Alberta experienced a brief influx of what can only be classed as "Unions of Convenience" used by Employers as a means of blocking organizing efforts by the building trade unions. In 1987-1988, when the new consolidated bargaining provisions of the *Labour Relations Code* were being considered, the established craft based building trade unions were "the only game in town".

British Columbia adopted a very loose form of non-mandatory accreditation and, in 1988, opened up the opportunity for "all-employee" or "wall-to-wall" certifications in construction. Labour relations has always been more fractious in B.C. than in Alberta and much more politicized in the small p and the large P sense. A series of new unions emerged from the B.C. experience and some saw opportunities to expand into Alberta.

One of the early, but very significant, experiences occurred in the small-inch pipeline industry; that part of the industry that builds the collector and feeder lines for petrochemical projects rather than the far larger "big inch" pipelines that move the refined product to market.

One case discussed in detail how and why the Board would approach with considerable caution voluntary recognition agreements with organizations purporting to be trade unions that did not genuinely represent the employees in the unit for which they purported to bargain. It is an early instance of an employer negotiating a "sweetheart deal" with a compliant union partner to ward off potential or actual building trade certification drives.

A company, that was certified by at least one building trade union, took over a second company to undertake work free of the Registration agreement. The company purported to sign a "wall-to-wall" voluntary recognition agreement with a B.C. trade union, the General Workers Union of Canada, Local 2, under the Presidency of the rather colourful Mr. Rocco Salituro. There were no employees in Alberta working for the company at the time nor was there a Local 2. The Board found this "wall-to-wall" recognition was motivated by a desire to immunize the company from certification by the building trade unions. It was an avoidance technique justifying the Board in issuing a common employer declaration binding the second company to the first and thus to Registration.⁵⁸

A second pair of related companies also became involved with the General Workers Union. The first found itself facing an organizing drive by four building trades unions.⁴

⁵⁸ *Midwest Pipeline and Plain-Pacific v. Labourers' Local 92* [1990] ALRBR 579. The case was the first significant case under the now section 190 spin-off provision. See also: *Plumbers Local 488 v. Plains Pacific Construction* [1990] ALRBR 251.

It reorganized itself and formed the second as a labour contractor. As a result of the same introduction the new company voluntarily recognized the GWU and signed a "wall-to-wall" collective agreement. Early negotiations took place for an extended agreement and a purported ratification took place, but only involving a small proportion of the employees. The agreement saw the Employer pay employees a "weekly incentive" which was offset by an equal deduction for "working dues" which were sent to the GWU. Under this purportedly ratified voluntary recognition agreement, the Employer undertook most of the feeder line work for the new Shell Caroline Plant. Sums in excess of a million dollars were sent to B.C. to the GWU without any apparent union presence in Alberta. Some wildcat strikes ensued. Several building trade unions then sought to organize the employees working on the job. The employer challenged their right to do so arguing that a collective agreement was already in place with the GWU.

The Labour Relations Board, for a variety of reasons, found collective agreements had not in any real sense been ratified by the employees, and the GWU was not properly a "trade union acting on behalf of employees". It also found that, by voluntary recognizing and signing a collective agreement with a union that was unrepresentative of employees, in order to block building trade organizing, the employer had committed an unfair labour practice. It amounted to prohibited employer support of the GWU in the form of a "sweetheart deal".

The case discussed the circumstances when a union and an employer can enter into a valid voluntary recognition agreement.⁵⁹ The rules on voluntary recognition in Alberta, to that point were not clear. The Board said at the time:

... we reject the assertion that a trade union and a willing employer have an unrestrained authority to bind employees. It ignores both the specific wording and the general spirit of the legislation. However, this leads us into the uncharted waters, for Alberta, of where the restraints lie and to what extent they operate.

It went on to contrast union avoidance with the well-established practice of voluntary recognition of building trades unions by Employers, where the recognition involved a collective agreement commitment to supply union members to work for the Employer. To be a bargaining agent a trade union must be "acting on behalf of employees". The *Code*, (then s. 19 now s. 21) gives employees the basic right to belonging to and participate in a union. Then section 40, now section 42, makes it clear that voluntary recognition too depends on the union "acting on behalf of employees."

⁵⁹ The voluntary recognition question is discussed beginning at p. 880.

42 Subject to this Act, an employer has the right to bargain collectively with a voluntarily recognized trade union acting on behalf of the employer's employees or a unit of them.

This does not mean simply negotiating terms that will apply to employees; it "connotes some choice flowing from employees in some real representational capacity." This point is relevant to the proposals dealing with the build-up and early renewal question and to what was contentious about the CNRL-Division 8 situation in 2005-2007.

Referring to the core principles in the *Code*, the Board said⁶⁰:

This choice belongs to employees, not to employers. Several provisions in the Code exist to protect this fundamental right. These protections permeate the unfair labour practice provisions, the certification process and the provisions governing collective agreements. Section 146 and 131 are examples. These protections also illustrate the broad purpose or spirit of the legislation. The fundamental right and freedom guaranteed to Alberta employees under this legislation is the right to join with fellow employees in collective bargaining, free of undue influence from the employer or those acting on the employer's behalf. This right, while collectivist in nature and based on majority rule, is an employee right.

The institution through which employees can express their right to bargain collectively is the trade union. But the Code's primary focus is not to benefit trade unions for themselves. It is to support them because they represent employees and to give a legal framework within which they can freely carry out those representational activities. Voluntary recognition is not a way of circumventing the employees' freedom to choose union representation, but of facilitating that choice.

The Board discussed the influence of the unfair labour practice restraints on voluntary recognition.⁶¹

In assessing these situations, the Board would look closely at an employer extending recognition to one union to defeat the organizing efforts of another. It would also look closely at what the cases refer to as "sweetheart deals", where unions and employers benefit to the detriment of the employees and their statutorily protected rights.

The General Workers Union argued that it fell within the "hiring hall exception" to the restriction on voluntary recognition without employee support. There was no evidence to support such an argument and it was dismissed on the facts. The exception was thus

⁶⁰ Sie-Mac, *supra* at p. 883

⁶¹ Sie-Mac at p. 897

recognized but not described in any depth for Alberta. The Board found, in conclusion that⁶²:

The General Workers Union, in its dealings with this employer, in this Province, is operating as nothing more than a Union of convenience. We find the employer and the trade union have entered into a relationship solely for the benefit of the Union organization and the employer. This has been done by the employer ignoring the statutory rights of the employees and by the Union willingly taking the employees' money without providing any services whatsoever.

...

... the employer felt it could not live with building trade union certification, which would mean being caught by registration. We find the steps taken in negotiating with the General Workers' Union were not taken in any belief that the Union represented employees or had their best interests at heart. Instead, they were taken because, in the employer's view, a General Workers Union agreement would shield them from certification and the effects of registration. We believe these negotiations and the subsequent ratification were basically employer driven.

...

This is a callous two-way exchange. The employer gets a protective agreement. In return, the Union gets to collect substantial dues. The Union is entirely dependent on the employer, since it has no independent source of support from, or contact with, employees. The Union, as a result, does nothing to represent the employees' interests vis-à-vis the employer on whom the Union depends. This management influence severely impairs this already weak and disorganized Union's fitness to represent employees.

The case illustrates the potential to use a voluntary recognition agreement, and a collective agreement based on that recognition, to bar legitimate applications for certification. The Board then and since has attempted to balance the use of voluntary recognition for legitimate reasons with the potential for its use as an avoidance scheme. Employee ratification requirements are one method of legitimizing such agreements, but that process too can be ineffective or abusive of employee rights.

The longer-term significance of this and related cases is that it identified the wall-to-wall unit as an integral part of the strategy to avoid building trade certification plus the use of early and small groups of employees to obtain recognition or certification. It also

⁶² Sie-Mac, p. 900-901

established early on what should have become accepted limits on employer involvement in the selection of bargaining agents.

The General Workers Union and others left the Province. Gradually, alternative unions began to rely more upon certification applications as a way to obtain the right to bargain, thus avoiding the perils inherent in voluntary recognition agreements. However, that process, even though it is statutory and more formal, can equally serve to undermine employee rights in some situations.

The Hiring Hall and its Alternatives

One of the most lasting effects of the 1982-88 downturn was that employers that spun-off companies and operated outside of Registration had to find new ways of locating and attracting employees. They developed ways to inventory those with the necessary skills, contact them as and when needed, and provided them with pay and benefits sufficiently analogous to what they were used to that they would be willing to work.

Employees proved anxious to take any work they could find in a slumping industry. More difficult was providing health, welfare and pension benefits. The Merit Contractors Association fairly quickly developed group insurance programs for the employees of member contractors. RRSP plan contributions became a substitute for pensions. The Association began offering recruiting and training programs for new recruits. Much of this was facilitated by developing computer technology; for modular training programs, benefit administration, and tracking and contacting available employees.

Building trade unions and their members reacted to these developments in different ways. Some sought to use their constitutions to prevent members from working for anyone but a unionized contractor. Others recognized that employees still had to make a living and turned a blind eye to employees "tucking their cards in their boots" until work was available. Yet others saw the fact their members were working for non-union contractors as an opportunity to organize those contractors.

It was a period in which the assumption that only the building trades could supply labour, and only those unions could supply the benefits of employment, broke down considerably. It resulted in the development of an alternative infrastructure. Further, it gradually built-up a union versus non-union or merit shop divide within the industry that gradually took on ideological tones that transcended the more practical issues of recruitment, training, benefits and pensions.

Change in Owner Attitudes

Building a major industrial project takes vast amounts of capital and involves great risk. Early Alberta projects like Syncrude and Suncor were built by huge international construction companies, mostly operating on a cost-plus basis. As experience developed and the number of projects increased, owners became somewhat disillusioned with delays and cost overruns. Gradually owners decided, to the extent they could, to avoid “putting all their eggs in one basket.”

For a long time, those contractors with building trade union affiliations, bound by Registration, were the only parties with the capacity to handle large-scale industrial construction projects. However, within commercial and institutional construction particularly, and to a degree in pipeline construction and road building, either new contractors were breaking into the market, or existing contractors were developing capacities on the non-union side to take on more substantial projects. Ledcor and Flint are two early examples. Technology allowed experimentation with the use of off-site fabrication shops, modular yards and so on to add efficiencies, cost savings and alternatives to the traditional model of building a project.

Affiliation clauses in the building trades agreements and the fear of inter-union rivalry or union versus merit shop disputes preserved the largest jobs to the building trade unions and the contractors signatory to Registration agreements. However, that too broke down and owners became willing to experiment with a more diverse group of contractors with different or no union affiliation. By the mid-2000's, the “open-managed site” had become more prevalent. These changes, while evident before the CNRL project, came to a head over plans for that project.⁶³

Owners also developed a growing sophistication in their ability to benchmark construction costs and productivity. While some owners are more “hands-on” in terms of labour relations concerns than others, all carefully contract for the work they want done with more precise attention to cost control, contractor capacity, performance, and timeliness. Greater attention is also paid to project scheduling, labour supply, and logistical issues like housing and transportation. Now, several projects are being built at the same time. Shortages of skilled labour, the need to rely on transient labour from elsewhere in Canada or the U.S., and sometimes on Temporary Foreign Workers, all require precise management.

This quick summary is sufficient to illustrate that, while owners once insisted that all on-site work be handled through building trade unionized contractors, that is now far from

⁶³ This is described in Chapter 10.

the case. The market has become more open to the various contractor labour relations arrangements, placing contractors and their union partners if any, under competitive pressure. However, that goes well beyond wage rate competition. It involves relative productivity, contractor reliability, secure sources of labour supply, and many other metrics. One of the more significant is the ratio of hands-on tradespeople compared to the number of support people used on a project. Attendance levels are an important metric. An ever-present concern now, is the issues of job safety, including the adverse effects of drug and alcohol use.

All bargaining done under Registration must follow a strict bargaining cycle. In contrast, bargaining outside of Registration is currently subject to whatever the employers or alternative unions agree. Each one of these non-Registration collective agreements includes the potential for a legal strike or lockout if the parties cannot agree. Some owners feel their commercial control is sufficient to protect against this. Others doubt it will happen since, so far, no alternative unions have struck. However, that situation can easily change, particularly as a tight labour supply puts upward pressure on wages and generates employee demands for changed conditions.

While days lost to labour disputes used to be a very important criteria, that concern has faded. However, it will return to the forefront any time legal or illegal work disruptions occur. Owners need to be mindful that disputes arising outside Registration are not subject to the regularity and restraints of Registration bargaining.

The Merit Shop Movement

The Merit Contractors Association has flourished since the 1982 downturn. Its original activities were focused on providing services to its members and their employees. Merit gained strength initially in the commercial sector of construction as non-union contractors increased their market share, but like those contractors, it seeks a similar development in the heavy industrial sector. It has for some time actively promoted what it views as the economic and productivity benefits of non-union contracting to owners as well as to contractors. What is more significant is that the Merit Contractors Association has become increasingly active in seeking legislative change through active lobbying, public debate and so on.

The Association's role in this area generates strong feelings, both pro and con. Some of its positions, unlike those of contractor organizations in the past, question the role of and the need for unions, rather than just seeking to adjust the appropriate balance between labour and management. This has served to increasingly polarize and politicize the debate over appropriate labour legislation.

Particularly controversial with unions are the Merit Contractors Association philosophical and organizational links to the American Associated Builders and Contractors Inc. (ABC Inc.). In the U.S., much more than has been the case in Canada, and certainly much more than in Alberta, labour relations has become a political issue. American unions, the building trades included, are heavily involved in the Democratic Party. The Republican party has, in contrast, developed an increasingly anti-majoritarian individualistic bent and, in both public and private sector labour relations, successfully advocated for legislation that clearly weakens the role of unions in society.

To note this increasing politicization is not to speak for or against it. However, the scheme of the existing *Labour Code*, to work, depends on a statutory and practical recognition of the right of a majority of employees to choose a union and thereafter to bargain for an agreement. Without that a labour code does not work. To the extent Merit is seen to represent that view, it generates controversy well beyond any specific issue.

Changes in the Union Environment

The difference between the largely Canadian industrial style unions and the largely North America craft unions has already been described. While the craft unions have remained relatively stable over time, the industrial unions in Canada have gone through a period of unprecedented consolidation. The merger of CEP and CAW into Unifor is just one example, as is the pending merger of the Telecommunications Workers Union and the United Steelworkers. Some construction unions are also changing, notably the emergence of the Teamsters Union as the major presence in the railroad industry.

Two factors may increase the presence of industrial unions in the Alberta construction industry. First, as this trend to consolidation continues, larger unions will look for new opportunities to grow their membership, and both the organized and unorganized construction industry are likely targets.

Second, Alberta's shortage of labour is leading contractors to deal with non-building trade unions other than CLAC where they have an ability to supply qualified employees. The ability of Unifor to offer tradespersons from Quebec as a result of its affiliation with a major Quebec construction union is just one such example. So far, CLAC has been by far the dominant alternative union. Industrial unions that already have a strong presence in non-construction often take quite a different approach to CLAC in bargaining, and take different approaches to union security, to grievances and

to strikes. It cannot be presumed that an increasing and more diverse industrial union presence in the construction industry will be free of workplace disputes.

Even within CLAC, changes have and will continue to take place. The more it is involved in representing employees on managed open site projects, the more it faces employee demands within its own organization to bargain over job site concerns. It has increasingly demonstrated the willingness and capacity to do so. Further, despite their membership in the PCA, the employers with whom CLAC bargains do not, and are not obliged to, present common bargaining demands. The more the alternative union contractor market share increases, the more these contractors compete with each other, rather than just with contractors under Registration. That competition, and the bargaining pressures it puts on any union involved, has the potential, of itself, to create industrial unrest. Employees on a site working for one contractor often raise demands for change when they see employees of another contractor receiving better wages, benefits, or job opportunities. That increased pressure may gradually give rise to some of the same difficulties that, when they occurred in the 60's, led to Registration.

Chapter 8 Assessing Proposals for Change

The mandate speaks of competitiveness and of stability. The review has sought objective evidence of the need for change and has indicated a preference for consensus solutions. Any changes, through legislation or labour board practice, will be in the context of the existing *Labour Relations Code*. This review involves no root and branch analysis of its broader provisions, which affects all areas of the province and the public as well as the private sector.

The *Labour Code* begins with a preamble, which itself provides guidance as to its objectives:

Preamble

WHEREAS it is recognized that a mutually effective relationship between employees and employers is critical to the capacity of Albertans to prosper in the competitive world-wide market economy of which Alberta is a part;

WHEREAS it is fitting that the worth and dignity of all Albertans be recognized by the Legislature of Alberta through legislation that encourages fair and equitable resolution of matters arising in respect of terms and conditions of employment;

WHEREAS the employee-employer relationship is based on a common interest in the success of the employing organization, best recognized through open and honest communication between affected parties;

WHEREAS employees and employers are best able to manage their affairs where statutory rights and responsibilities are clearly established and understood; and

WHEREAS it is recognized that legislation supportive of free collective bargaining is an appropriate mechanism through which terms and conditions of employment may be established;

Submissions made, and some of the underlying legal disputes, suggest that some core statutory rights and responsibilities are far from being "clearly established and understood". Legislation involving employee rights to representation, the respect for trade union independence and the rights of unions and employers under Registration has increasingly become the subject of dispute. The intent, purpose and mechanisms of Division 8 have similarly proved a source of controversy. These disputes have led to periods of uncertainty, during which some interests are subverted and others advanced.

This undermines the fourth objective; a focus on common interests in the success of the employing organization through open and honest communication.

A Stable Environment

From the point of view of potential investors, Alberta has two great advantages. Alberta has oil and gas in the ground and is blessed with other natural resources, including a well-educated and energetic population. It also has stability. Investing in Alberta is less risky than in many of the places that have similar untapped resources. Alberta has a stable government and a political system based on the rule of law. On the downside, it tends to be a little chilly in the winter, which makes construction a challenge.

Alberta's labour legislation has been stable for decades. Mostly labour law reform has been accomplished through widespread consultation involving all stakeholders not just partisans on one side or the other. It has been unlike many provinces that experience frequent political change and where changes in labour legislation are seen as part of the political rewards of a regime change. Some however view change in a similar light, as an inter-provincial "keeping up with the Joneses". This has led elsewhere to "windshield wiper" legislation, alternately moving from left to right. Such frequent changes can undermine stability. It is not something Alberta has experienced in the past. This issue was discussed federally in the report of the Review Panel concerning Part 1 of the *Canada Labour Code*. That report observed⁶⁴:

We believe that labour legislation should provide a framework within which the parties can work out the details of their collective bargaining agreements. It is not designed to set the outcome of disputes; those are left to the parties, as long as they abide by the Code's rules of fair conduct.

Throughout our deliberations, we heard both labour and management comment on the need for stability in our labour legislation. Both sides were reacting to what they view as excessive experimentation in the labour law reforms of a number of provinces. Undoubtedly there is room for political judgment about where the balance in our laws should lie. Some would push the pendulum one way, some the other. However, the concern identified by both sides is that the pendulum should not be pushed too far or too frequently. To do so destroys the predictability and underlying credibility upon which an effective collective bargaining system depends.

⁶⁴ *Seeking a Balance, Review of Part 1 of the Canada Labour Code*, Government of Canada, 1995 (Sims, Knopf and Blommin).

We identified a number of disadvantages of undue politicization of our labour relations laws. First, it distracts the parties from their primary role of negotiating appropriate collective agreements, tempting them instead to seek political "fixes" for what should be mutually bargained solutions. Second, it introduces an element of political confrontation into bargaining relationships, which undermines the ability of the parties to communicate frankly and directly with each other. Third, it creates the habit of seeking legislative intervention into collective bargaining disputes. This has a long term corrosive effect and, in our experience, causes more labour disruption than it averts.

Fourth, it implies that labour relations is simply a political question, which denies the fundamental compromises and self-determination inherent in our present legislative scheme. Finally, it leads to competition between jurisdictions, where one jurisdiction is pressed to minimize the impact of its laws to attract jobs from another. In Canada, in certain cases, this had led to a fragmentation of national bargaining structures and unnecessary variances in the various labour law regimes. This adds both cost and complexity to doing business in Canada.

Alberta's construction industry has grown larger and more complex. The competing interests involved are no longer just labour versus management; they are equally strong between different types of unions, differently structured contractors, and between general and specialized contractors. They span those who see unions playing a positive role in the industry, those who are "colour blind" as to union affiliation, and those who are opposed to unions and to the *Labour Code* provisions that, in their view, sustain unions.

Change can be achieved through negotiation. This industry has bargained many positive changes to meet altered economic conditions and the need to attract both capital and labour to the Province. More recently, change has occurred through the twin tools of litigating and lobbying. This is more fractious, and undermines the search for consensual solutions to shared problems.

The introduction to the final report of Alberta's last major review of its labour legislation⁶⁵ read in part:

Alberta has a good history of stable labour relations by North American standards ...

Attitudes are developed over many years and are influenced by many factors. Legislation may not immediately change attitudes and thereby relationships, but it can provide direction and hasten improvements. Mutual respect and a sense of commonality of interest are a direct result of the attitudes of the participants. When attitudes are positive and constructive, commonality of interest develops with the result that

⁶⁵ *Labour Legislation Review Committee Final Report*, February 1987, Government of Alberta.

employees and employers increase their mutual trust. When suspicion, disrespect and distrust grow the participants themselves suffer the consequences. It is clearly understood and acknowledged by everyone that acrimonious labour relations pay no dividends and that all involved lose in the long run.

These observations remain true, indeed relations between the building trade unions and their contractors are healthy. However, for a variety of reasons, mutual trust between some of the participants in this industry has declined almost to the levels of 1982-1988, also a period of acrimonious litigation.

An important aspect of stability is the prevalence of labour disputes. As noted above, Registration bargaining has produced an unprecedented strike and lockout free period lasting since 1988. The level of common understanding between labour and management within Registration is high, and despite serious challenges facing this part of the industry, they have been able to develop consensual solutions.

There has also been a remarkably long period without major unlawful strikes or lockouts. Despite disruptions in 2007, the incidence of such outbreaks, and the productivity lost, has been far lower since 1988 than was the case before.

This extended period of relative peace; relative to our neighbours and relative to our own past, may have created a certain amnesia. There are assumptions within the industry that such conduct will not reoccur, that competition will keep it at bay, or that alternative unions are far less likely to strike than others. However, we are entering a time of labour shortage, which will put strain on our collective bargaining system. Outside of Registration our *Labour Relations Code* allows lawful strikes or lockouts. It does little to prevent contractors outside of Registration competing, the one with the other, for employees and by so doing inviting a similar response. That is part of what leapfrogging in the past involved, and why multi-employer bargaining held attractions.

Competitiveness

Point 5 in the scope of this review expands on the competitive criteria:

The elements of Alberta legislation that may affect the competitiveness of Alberta's construction industry, with a view to maintaining and improving Alberta's preeminent position as a supplier of construction services with a stable construction labour relations environment.

In 2010, the Government of Alberta undertook a major review of Alberta's competitiveness. It began by putting the question of what is competitiveness in a broad framework.

"The fundamental source of long term prosperity is the productivity with which a nation (or province) can utilize its resources. Competitiveness is about creating the conditions under which companies and citizens can be most productive"

Michael Porter in Competitiveness Index: Where America Stands, US Council on Competitiveness, 2007

For an individual business, competitiveness is generally defined in terms of increasing sales, lowering costs and gaining market share. For the provincial economy as a whole, however, competitiveness has a much broader interpretation – creating the right conditions so that companies and people can grow and thrive, while protecting social values and ensuring responsible stewardship of the environment. Competitiveness does not represent an objective in its own right. The ultimate objective for Alberta should be to improve the standard of living of Albertans in a sustainable way, and competitiveness represents a means to this end.

For the purposes of this report, competitiveness is defined as "the condition created when government, industry and Albertans work together to pursue sustained prosperity."

Alberta's economic prosperity can be best defined in terms of standard of living – the total level of income generated by the economy that is available for business re-investment, individual consumption and saving, and public spending on essential social services. Therefore, prosperity is best described as generating more income and a higher standard of living for Alberta – but this must be done in a way that can be maintained over generations. (*emphasis added*)

This is useful for the issues at hand, particularly so when considering the quite divergent views of the Coalition, the Alliance and those of the Merit Contractors Association. Discussion paper #2⁶⁶ identified and sought input on a series of metrics against which Alberta's competitive position might be assessed. The crucial issue appears to be labour supply.

Competitiveness, in this light, needs to be broken down into its component parts. A company can be more competitive if it can bid the work at lower rates without any reference to productivity. Merit Contractors in their publications, frequently divide what they see as the advantages of open shop contracting in this way, suggesting

⁶⁶ Appendix 4

benefits from wage cost savings, increased productivity and a more competitive marketplace. They note that building trade collective agreements involve costs, for training, pensions, and benefits that add costs for the contractor and customer but do not add to the employee's "in the jeans" pay package. By reducing these "fringe benefit" costs, employees can be paid a higher base rate, while still generating overall savings.

The other aspect of competitiveness is productivity. Merit Contractors argue that the open shop concept allows employers to pick and keep the employees they value rather than having to rely upon union dispatch. The building trade unions emphasizes their training programs and the quality of their tradespersons and the reliability of their labour supply. The Merit Contractors emphasizes the flexibility they can offer in the use of persons free of jurisdictional rules while the building trades argue that they have achieved similar results with collaborative working arrangements.

Merit Contractors maintain that a competitive market is inherently more efficient, described this way in one article:

In order for owners to have access to cost-effective construction, there must be a competitive marketplace. The presence of Alberta's strong non-union sector is the main reason industrial owners in the province are able to access more cost-effective construction than in union-only markets such as Ontario. Union-only projects are a customer-created monopoly that only weaken the cost protection that competition provides.

An active open shop sector has enabled construction owners in Alberta to realize hundreds of millions of dollars in savings. Continuing to nurture healthy competition is a sensible way to ensuring access to cost effective construction.

Labour Supply

The Alberta Competitiveness Council 2011 Report – Moving Alberta Forward, says boldly⁶⁷:

Alberta's single greatest challenge to competitiveness is labour supply. The recent global downturn relieved some pressure in the province's labour market, but a new period of labour shortages is fast upon us. Companies are already reporting difficulty sourcing the workers they need.

⁶⁷ Page iv

A report by the Construction Owners Association of Alberta, in May 2011, begins⁶⁸:

Canada is facing a shortage of construction workers over the next decade – the industry will need to recruit in the order of 320,000 workers from 2011 to 2019, ... About 1/3 will be required to handle growth, while 2/3 will be needed to offset retirements. Nowhere will the scarcity of skilled trades be felt more acutely than in the Alberta heavy industrial construction and maintenance industries. Because heavy industrial projects are key building blocks in the Alberta resource-based economy, constrained delivery of projects will translate to constrained provincial and national economic performance.

To realize Alberta's full potential – and the spinoff benefits in other provinces – this imminent workforce challenge must be addressed immediately by industry and by governments. Owners, contractors, labour providers and governments must work together to get out in front of the challenges.

Each year the Construction Sector Council prepares a presentation "Construction Looking Forward". The latest, "An Assessment of Construction Labour Markets for 2012 to 2020" includes important predictions about Alberta's future labour supply needs. It described the highlights as follows:

- Alberta's construction industry returns to the record high peak levels of activity reached between 2006 and 2008, surpassing previous peak employment requirements by 2015.
- Meeting near-term labour requirements depends on the industry's ability to draw in an equivalent number of out-of-province workers to replace the number that exited during the 2009 recession.
- The expansion that begins in 2015, however, will once again test the capacity of the industry's workforce, as growing residential and non-residential building construction requirements stack on top of a second wave of major natural resource-related engineering projects.
- Over the long term, sustaining capital projects and shutdown/tumaround work will play a more important role, as all the new facilities being built will need to be maintained.

⁶⁸ Construction Owners Association of Alberta, Heavy Industrial Construction and Maintenance, Workforce Challenges in Alberta, May 2011.

- The ability of Alberta's construction industry to recruit for the oil sands, pipelines, utilities and other industrial projects depends on the mobility of key trades and on competing demands from other major resource-based projects across Canada.

The report points out that other major projects planned within the Province will draw on the same pool of tradespersons. At the time these included:

- Pipelines (Northern Gateway, Woodland extension, etc.)
- Transmission lines (ATCO Power and AltaLink)
- Quest Carbon Capture and Storage (CCS) Project
- Bow City Power's 1000MW coal-fired power plant
- Maxim Power's 500MW generation plant
- Transportation projects (light rail, airport developments, etc.)

Trade demand projections in several other provinces are also expected to draw key tradespersons out of Alberta.

The report predicts moderate employment growth until 2013 with a tightening labour market for some specialized trades and occupations. It forecasts a resumption of expansion for 2015 with a second wave of oil sands-related engineering investment, with a rising demand for non-residential building and new housing construction further limiting the pool of available labour. It predicts that, for 2015 to 2018, the labour force will struggle to keep up with sustained employment growth. The mobility of the provincial workforce to meet the demand will be insufficient to meet the need for workers. The projected 27,000 new entrants into the construction workforce will be more than offset by an estimated 34,000 retirements.

Significantly for trade bargaining, the labour market rankings show that some trades will face a tighter supply problem than others, particularly in the 2015-2018 period, with many having to recruit beyond our local or adjacent markets. Ironworkers particularly may see intense competition by 2017.

The COAA May 2011 paper emphasizes that the more mega projects that come on stream, the more tradespersons will be required for operations and for ongoing shutdown maintenance. It suggests, at p. 14:

As major plants and other facilities are completed, more operations and maintenance personnel will be required – and as the pace of new construction drops off, fewer construction personnel will be required. The proportion of maintenance projects will shift from about one quarter of the workforce to three quarters, over the next 20 years.

The COAA paper described three main approaches to meeting the challenge of labour supply.

- Improve the productivity of the existing workforce;
- Develop a long-term vision for the workforce of 2025 and monitor progress towards that projection;
- Improve interprovincial and international access to temporary workers.

The same report looked at the projects forecast for Alberta and concluded that a gap of up to 40,000 workers could arise for Alberta projects, more than half that group affecting oil sands projects. It observed:

Beyond the billions of dollars of project value are even greater contributions to provincial GDP once the plants are completed. All Albertans – and Canadians – lose if labour shortages result in project delays or cancellations.

The economic incentives to find solutions to this gap are high. The COAA observed:

A culture of cooperation and understanding thrives throughout the industry. The relationships among governments, owners, contractors, and labour providers in Alberta are supportive and productive, defined by mutual respect and dependence.

There is a danger that the disputes described in this review may increasingly challenge this culture. No single fix will be sufficient. There will be peaks and valleys. A clear view of what Alberta's long-term needs will be is essential to getting the right mix between developing a permanent workforce and using transient temporary interprovincial and foreign workers. Alberta has made adjustments to its apprenticeship rules to increase the flow of apprentices⁶⁹. However, given the need for continued reliance on skilled trades from elsewhere, Alberta, as a likely net consumer of construction workers, has a strong interest in seeing similar developments in other provinces.

One important solution is to make more productive use of the workforce already in place. The proponents of a move away from craft based labour relationships describe the craft divisions as a barrier to increased productivity. The building trade unions emphasized that they have made progress in developing efficiencies on that score with

⁶⁹ *Access Denied: The Effect of Apprenticeship Restrictions in Skilled Trades*, Robbie Brydon and Benjamin Dachis, C.D. Howe Institute, Community No. 380, May 2013.

the contractors with whom they bargain. Craft divisions are not the only factor, as several owners emphasized. The COAA report notes at p. 6:

Productivity improvement is primarily about effective planning processes and effective management discipline, then about workforce “improvements”. Productivity happens when the right tools, materials and information – and the right skills – are all at the workplace when needed. Owners can commit to best practices in planning and management, such as COAA WorkFace Planning, and can engage their contractors and suppliers to do likewise, to achieve a significant increase in “time on the tools”.

It also suggests better use of apprentices (including taking advantage of the newly altered provincial rules), increased emphasis on the recruitment and on-site accommodation of women, first nations members, and other currently under-utilized resources, and the retention of older workers. A particularly significant challenge, which is true for workers in many industries, is the need for ongoing learning.

Significant focus on supervisory training for promising mid-career workers is needed to meet that replacement demand. This is a challenge, but also a near-term opportunity to renew the leadership of the industry with “21st century” supervisory skills.

More on-the-job training (just-in-time training) can help to bring specific skills to bear when they are most needed, while enhancing worker cross-functional employability, flexibility, and earning power.

The report elaborates on this somewhat at p. 10:

In addition to the highly visible shortages of skilled trades, there is also a shortage of planners and organizers with the expertise to keep the trades productive on site. The COAA Workface Planning Committee estimates that “getting the right skilled trades with the right tools in the right place at the right time and with the right information” can improve tool time by as much as 25 percent. Such an increase in productivity would go a considerable distance to relieving trade shortages.

Another suggested priority to improve productivity (which includes safety) and to enhance the image of construction as a desirable career choice is:

Making construction worksites more respectful and better managed (in the “people” sense as well as the process sense), to improve morale and decrease absenteeism and turnover, including doing more to integrate workers from non-traditional pools.

Change the culture and pursue other measures to reduce, and eventually eliminate, the negative effects of alcohol and drug use on safety, performance and attendance.

Labour supply is of direct and indirect significance to the issues currently being addressed. First and foremost, competition in the construction industry is quite different, and collective bargaining dynamics are very different, in times of short supply compared to oversupply of labour. Some competitiveness arguments are framed as if lower cost was the key issue, whereas in fact the ability to attract or supply labour is the more pressing concern.

Solutions to Alberta's trades labour supply needs fall beyond the scope of this report. However, there are ways labour relations differences can influence or impede progress in that area.

First, there is an accepted need for training; both in basic trade skills and as part of a commitment to life-long learning. The building trades – REO negotiations have resulted in the creation of various training funds, and from these funds, very substantial and impressive training facilities that contribute significantly to enhancing the abilities of union members within the workforce.

Some contractors see training funds as a sort of payroll tax, and take a competitive advantage by employing persons, perhaps at similar base rates, but without the training add-on. Saving on training costs may enhance short-term competitiveness but it foregoes (or transfers to the public at large the cost of) longer-term advantages.

Another factor is the use of apprentices, and limitations on their use. This is a contentious issue for reasons of safety, job continuity and training. It is an area where disputes over who should train apprentices, and the allegiances they might form as a result, should not cloud the broader debate about how apprentices should be trained – both in the classroom and on the job.

Alberta's Apprenticeship Program is governed by the *Apprenticeship and Industry Training Act*⁷⁰. That Act distinguishes between "compulsory certification trades" and "option certificate trades". The distinctions drawn and the statutory restrictions that result relate to one of the important issues that separate the Coalition Contractors and the Alliance Contractors and their respective union affiliates. That debate too needs to transcend, although not ignore, the difference over craft-based and all-employee approaches to project management. Whatever these ideological and managerial differences, the system as a whole needs to provide sustained training opportunities for the apprentices Alberta needs for the future.

⁷⁰ R.S.A. 2000 c.A-42

Lastly, many in the industry recognize the need to make a trade career more attractive to both students, and to the parents who influence choices. More attention might usefully be directed at training in project labour management - the planners and organizers - the people managers. Benchmarking and project management techniques have improved greatly. However, the industry still tends to train its tradespersons and its engineers and planners quite separately, whereas modern techniques suggest a need to bridge the two. Perhaps developing continuing education in project management skills for tradespersons will yield a more attractive career path for persons considering a trades-based career.

As both the building trades at one end and Merit Contractors at the other fully realize, how a person is trained, and how they start and advance their careers, are important in solidifying their allegiances later in life. But this contest for allegiance is less important than the Province's long-term need for tradespersons however trained.

All this report can do is recommend that these issues be examined by the entire industry, perhaps through a ministerial round-table, regardless of ideology, with a view to meeting the broad challenges of construction labour training and supply. The different interests and agendas need to be recognized, but cannot be allowed to divert attention from the task of attracting persons to this industry and providing them with the training that will make them increasingly productive. Cutting back on training to obtain a wage rate advantage, or cutting back on the use of apprentices to retain work for existing employees, and similar such interests, can be counter-productive of this goal.

Chapter 9 Certification

The certification process is at the heart of our system of collective bargaining and has a fundamental impact on labour relations.

So begins Chapter 7 of the leading Canadian labour law text⁷¹. For a labour code to work, employees have to have an effective way of choosing, changing, or cancelling trade union representation. That right needs to be capable of exercise free of employer interference. For the reasons explained above it is the employees' collective choice, not the employer's choice.

Several proposals, and many of the concerns expressed about these proposals, relate directly to certification. But it is not just certification that is the issue; it is that certification by a building trade union binds an employer to Registration.

Submissions use the terms "raiding" and "raid proofing". A raid is simply a term used to describe a certification application by one union where another union currently represents the employees. "Raid proofing" means putting one union in place so that another union cannot apply for certification, along with other steps designed to achieve that result.

The term "raiding" has a negative connotation to it, conjuring up competing tribes, and war-like behaviour. It is true that those organizing on behalf of a union can be assertive and at times cause inconvenience or disruption to off-duty routines. It is also true that, where the majority of employees live in closed camps and are bussed to and from the job, the opportunities for organizing away from the worksite are very limited. The *Code* protects employers by saying certification applications procured through picketing must be denied⁷². However, the *Code* also expressly contemplates open periods, a union's right to seek certification, and an employee right to change unions. When employers create impediments to these processes unions and employees react in kind. At least some of the fear of disruption in Alberta's construction community is a result of inappropriate employer involvement. Unfair labour practice restraints may be available, but often prove ineffective due to litigation delay. And at least some of the rancor and strong feelings stem from lack of credibility in the original selection of a union by a tiny fraction of the ultimate workforce.

⁷¹ *Canadian Labour Law* (2nd edition) George W. Adams. The way certification works and the reasons for it are described in Chapter 3.

⁷² s. 38(2)

Some downplay the importance of the certification process in the labour relations system. They argue that employees mostly don't care; that a minority are strong union supporters, another minority does not like unions at all, and the majority in the middle doesn't much care either way. But the same can be said of most other forms of election. Often people seem not to care until an issue comes up that gets them riled, then they become more concerned. Sometimes it takes an election to disclose or give focus to differing views. In organizing campaigns for certification, just as in elections, sentiments change or solidify only as the decision looms.

Some of the relatively few wildcat strikes that have been experienced in this industry have been due to or influenced by representation issues; for example, stoppages over the General Workers Union events in the small inch pipeline industry, and disputes in 2007, partly related to the CNRL-CLAC umbrella agreement strategy and the fallout that followed.⁷³

Given the centrality of certification and revocation to the labour code's processes, any proposal to eliminate those opportunities should require substantial justification. This is because representation issues can themselves be a source of industrial conflict. It is because they are the justification for the employee's collective right to bargain. And it is because the right to change as well as the right to select and revoke a trade union's authority are central to the *Code*.

It is argued by the Coalition that these are all employee rights that employees ought to be able to waive if they so choose. However, experience suggests employee ratification processes are too often an expression of employer desires and sometimes trade union desires not to face revocation by employees or, more often, certification by another trade union. The election analogy would be an incumbent party asking the electorate not for a mandate, but a waiver of a scheduled election. If employees truly wish to continue with the form of representation they have, then the waiver (through ratification or otherwise) would be unnecessary since a prospective union would be unable to attract the necessary 40% support to make an application nor could it obtain the necessary majority support on any vote. Again, substantial justification should be needed to override such central features of the labour relations system.

Construction Certification Statistics

Before assessing proposed changes, it is illuminating to review what has been happening with certification in construction. There has been considerable growth in the

⁷³ Clearly 2007 has other causes as well, but several unions attribute the basic difficulty to members having had to work under a CLAC agreement.

number and size of contractors operating outside of Registration, and in the market share they command vis-à-vis the building trades.

The Alliance submissions contained an analysis of the certificates granted by the Labour Board between 2003 and 2012. Of a total of 339 certificates issued for construction bargaining units; only 34 were issued to building trade unions and 15 of those were in 2003, only 19 thereafter. The analysis showed that, of the 339 certificates issued over 10 years, 86% were to CLAC and 4% to CEP, CISIWU and a few employee associations.

These are startling figures, justifying closer examination. Certificates granted over 3½ years, between January 1, 2008 and June 30, 2012, were examined in more detail. That analysis confirms the Alliance's figures but goes further. Of the 132 certificates granted in that period, 118 were to CLAC, (89.4%). The building trades obtained 5 certificates (4%), CEP 2 certificates, CISIWU 1 certificate and employee associations 5.

Obviously, the volume of CLAC certifications has dwarfed all others for a decade. That number reflects, in many cases, multiple certifications sought, one for each craft and sometimes for different sectors, for the same employer. However, the same can be said for other applicants.

The building trade unions attribute this primarily to "raid proofing". They also argue that increasingly difficult site access, employer opposition and, since September 2008, the amendments in section 34.1 and 52 (4.1) and 53.1, have worked against their ability to use the certification process to any real effect. But "raid proofing" is the major issue from their point of view. They believe CLAC certificates are being arranged soon after a "purpose built" employer is established. Collective agreements are then negotiated and used to block any subsequent building trade organizing amongst the employees. Each CLAC certification was obtained following existing Board rules and following a certification vote. The concern expressed is less over CLAC's pursuit of these applications and more over the apparent role of employers in facilitating these steps.

The 118 CLAC certificates granted in the 3½ years broke down as follows, based on the numbers estimated to be in the bargaining unit, as shown on the applications for certification.⁷⁴

Estimated No. of Employees	Number of Certification Applications
2	27

⁷⁴ The numbers found in the LRB officer's reports, and the numbers voting provide a check on these estimates, which overall appear to have been relatively accurate.

3	23
4	17
5	4
6	10
7	9
8	4
9	3
10	5
11	1
12	2
15	2
16	1
18	2
23	2
25 and over	6 (25, 32, 39, 48, 55 and 60)

Thus, half these certificates were from units of 4 employees or less. Only 16 (13.5%) were from units of more than 10 employees. Yet the Employers involved were mostly those involved in supplying labour for Alberta's major petrochemical or pipeline projects, suggesting units that may well grow to hundreds of employees in some trades. These statistics raise a legitimate question as to how this happened. The figures suggest "industrial relations matchmakers" at work, arranging marriages for brides before they come close to reaching the age of informed consent.

Submissions for the Alliance and the building trade unions individually suggest that early organizing is rampant. The Labour Relations Board decisions in individual cases bear this out as well. In particular, the Board decision in *Firestone* presents a very detailed account of what has been happening and, for some cases at least, why.

The Firestone Decision

The facts giving rise to the *Firestone* decision in 2009⁷⁵ illustrate many of the issues behind this review. First, it illustrates the changing contractor attitudes described in Chapter 7. Suncor had significant cost overruns on its Millennium project between 1998 and 2003. It decided to tender its new Millennium Vacuum Unit (MVU) project on a "managed open bid" basis⁷⁶. Flint Energy Service Ltd. is part of a large U.S. energy

⁷⁵ [2009] Alta L.R.B.R. 134

⁷⁶ *ibid* para. 28

services company. It is a non-union contractor. Firestone is a labour broker used by Flint to supply labour.⁷⁷

Between May and August of 2003 Firestone was certified by CLAC for six general construction bargaining units. Firestone and CLAC signed a collective agreement covering four trades lasting from September 1, 2003 to March 31, 2005. Flint had obtained a large part of the MVU contract, which it viewed as “a breakthrough for itself and non-building trades contractors”. It was a cost-plus contract, with any increases in wage costs flowing through to Suncor. Concerned about “labour-strife and organizing” the decision says “Flint decided early to try to perform this work through affiliated companies that were not non-union, but had bargaining relationships with CLAC.” This meant companies with the advantage of a non-building trade collective agreement, which agreement would provide a bar to any other union’s organizing efforts.

Work began in late September 2003, after the first six certifications were in place. As trades were added on site, CLAC and Firestone voluntarily extended the reach of their collective agreement. CLAC applied to certify the electricians when there were just four on site. However, that workforce quickly grew to 40. The IBEW learned of the work and opposed the CLAC application. CLAC lost the vote 2/2. That meant they could not reapply for 90 days⁷⁸. What happened next is described in paragraph 42:

[42] This left the ready-to-swell electrician workforce without a bargaining agent or collective agreement and CLAC barred from a second application for 90 days. When CLAC reported the result of the vote to Mr. Olmstead, Flint considered what to do next. It discussed the situation with Suncor. According to Mr. Olmstead, there was a need to protect Flint’s breakthrough opportunity with Suncor, which could lead to other heavy construction work. Flint considered it important that all its employees should be as far as possible on common terms of employment. Flint officials made the decision to transfer responsibility for the electrical work under the MVU contract to HJB, which had a CLAC collective agreement that covered electricians.

[43] It did so by simply removing Firestone as the contractor on the electrical work, substituting its affiliate HJB, and moving the Firestone employees onto the HJB payroll. To do so, it had to terminate their employment, issue termination documentation, and have them accept the offer of work for HJB on more or less the same terms and conditions of employment.

This illustrates the “disposable labour broker” concern expressed by many of the building trade unions.

⁷⁷ *ibid* p. 32. The Board found Firestone to be an *alter ego* of Flint. The relationship with Flint is described above under the heading “The breakdown of the employer”.

⁷⁸ This is due to the time limit in Section 57.

For a while HJB did the electrical work on the Suncor project while Firestone did the rest. Later on, Firestone called CLAC to have three electricians do electrical work in Flint's parking lot in Sherwood Park. CLAC and Flint's manager discussed CLAC using this work to certify the electricians which they could do since the 90 day time bar was by then over. In December, once certified, Firestone took back the electrical work at Suncor from HJB and all the electricians were transferred back again to Firestone, ostensibly so as to have all the employees work under one collective agreement. Once again, this illustrates the "disposable contractor" concern. The building trade unions believe this was all contrived to preclude any organizing by the IBEW.

When it appeared that the MVU project would last somewhat longer than expected. Flint's manager approached CLAC and asked to open negotiations early to extend the agreement. Firestone's wages had become uncompetitive and the employees were unhappy; unless wage disparities were addressed soon there could be a "mass exit of manpower".⁷⁹ CLAC agreed to open up negotiations early. Both sides understood that doing so could eliminate the open period when other unions could apply for certification⁸⁰. CLAC's position is described at para 58:

[CLAC was] not set on closing the open period through an early renewal; but they knew their units were potential building trades organizing targets, and they were not averse to closing early if the negotiations proceeded quickly and something of value could be extracted from the employer by doing so.

The Board concluded that during the bargaining⁸¹:

Firestone made it clear right at the outset that if the bargaining "went wrong" – if ratification failed, entirely or in part – Flint had the ability to take that work away from Firestone and subcontract it elsewhere. It is also clear that Firestone wanted a settlement and a ratification covering all the trades, failing which there was likely to be no deal at all.

CLAC then held a ratification meeting, on very short notice, during which it purported to explain the deal to employees, as well as the fact that ratification had to be approved trade-by-trade, that they were terminating an existing agreement, and they were closing off the open period. The Employer's lawyer wrote up a ballot for the union to be used to reflect all this. The meeting was held on January 19, 2005 in the lunchroom on-site,

⁷⁹ Ibid para. 54

⁸⁰ Ibid para. 56

⁸¹ Ibid para. 63

during paid time. Most employees only heard of the meeting that morning by word of mouth, and then with little detail of what it was to be about.

Many disputes arose about the quality of the ratification meeting. All but one trade purported to ratify, and a second vote was held for that unit. CLAC and Firestone then treated the new contract as in place and ratified for a term from January 19, 2005 to March 31, 2007.

In March 2005, UA Local 488 and IBEW 424 sought to organize the employees on-site. IBEW obtained the threshold level of support but was met with the argument that their application was time barred. This illustrates why the building trades oppose early renewal of collective agreements. The Board decided⁸²:

- (a) That Firestone interfered with the representation of employees contrary to s. 148(1)(a)(ii) and contributed financial and other support to CLAC contrary to s. 148(1)(b) of the *Code*.
- (b) That the employees had not in fact waived the statutory open period and it in fact remained open.
- (c) That the statute's open periods, properly interpreted, are matters of public policy that cannot be waived.

The Board's decision expressed its conclusions on early renewal as follows:

[241] It is in the public's interest, not just the prospective bargaining agent's interest, that unions be allowed to compete for employee allegiance. Competition promotes conscientious and effective representation by incumbents. The Code balances the desirability of competition among bargaining agents with the desirability of industrial stability by limiting the periods within which other unions may raid incumbents, and by limiting the life of employee membership evidence in support of a certification application to 90 days – thus making serious organizing earlier than this futile. The effect of this is to make it a matter of public interest that the periods for competitive organizing be certain and publicly known (through the public filing of all collective agreements upon which prospective bargaining agents may rely).

[242] To allow employers and incumbent unions to change these periods – or, as is the case in practice eliminate them, even with the consent of a more- or less-informed workforce – ignores the public interest in stable, certain, publicly known open periods

⁸² The Board had split the hearing into segments, dealing with the validity of the early renewal first. There were other complaints about employer and owner involvement in the building trade's organizing efforts that were left for a later decision.

and the competition for bargaining rights that these periods promote. For this reason, we now conclude that open periods encapsulate important public policy and cannot be negotiated away. Employers and incumbent unions may voluntarily enter into early negotiations and may renew their collective agreements. We think that for purposes of a competing certification application, however – and logically it should also be the case for a simple revocation application – the open period under the “old” agreement will remain in effect. The practical result is that early renegotiation of agreements is permissible, but the negotiation can only extend the agreement beyond its original end date, or replace it after the open period has passed. It may not terminate it early and replace it so as to make a certification or revocation application untimely.

The Coalition’s response to this aspect of the *Firestone* decision, which it seeks to reverse by legislative change, is useful in segregating the issues involved.

The whole concept of bringing a collective agreement into effect “early” can only occur with the agreement of both the union and the contractor.

What the *Firestone* decision effectively ended was a process whereby an owner could agree with a contractor and its union to put in place a collective agreement that would cover the total duration of a major work program at one of our industrial sites. The desire of all, including the workers, is that the contractor’s operations would not be disrupted by union raiding that could occur during an open period.

The closing of open periods to cover major work at an owner’s site is designed to limit disruption at that site. The Wallace Panel never appeared to understand this point. The actions of the union and contractor in *Firestone* may have been flawed, but that should not have led to a complete dismantling of that collective bargaining process that was designed to remove conflict and disruption from the workplace.

The *Firestone* decision is represented to the community as providing protection for workers to change their bargaining agent. In reality, the *Firestone* decision protects, in public policy, the ability and entitlement of unions to raid other unions notwithstanding that the affected employees are told of their right to change bargaining agents and agree to waive that right. In reality, *Firestone* protects union rights, not employee rights.

In order to accomplish the results the Wallace Panel wanted, it undid 30 years of Labour Board jurisprudence. This didn’t have to happen and should not have happened; and we believe the results of this decision should be changed.

You speak, under this heading, of a union strike being able to disrupt the total worksite. Please note that there have been no construction industry strikes by alternative unions in Western Canada, let alone Alberta.

But most importantly, no alternative union that we deal with and no alternative contractor that we represent wants legislation that would establish or “fix” the end date and duration of their collective agreements. Both want all the flexibility that is available under our legislation to negotiate duration, start and end dates.

Any redoing of the *Westbrook Electric* decision (which is endorsed by our Courts) and has been in place for 22 years and any changes to Section 183 to have it apply to alternative unions and their contractors, is not acceptable.

This response makes the valid point that a union and an employer may well wish to agree to having a collective agreement provide contractual certainty for a major contract that will be undertaken under that agreement. That owners would want this too is also understandable. However, contractual certainty for a project and cutting off the opportunity for a change of bargaining agent, are not quite the same thing. The response does not address several equally valid points that are the backdrop to the entire decision. The first is that the CLAC bargaining rights were established when the unit was very small, and for the deliberate purpose of blocking any later organizing by the building trades. If there was any doubt about this, the “double switch” involving the electricians⁸³ makes the conclusion inescapable.

The claim that this is what the employees themselves wanted ignores the Board’s finding that the voice of the employees - the ratification process - was rushed and ineffective and (at para. 264):

All of this puts it beyond doubt to us that the early renewal and closing of the open period was motivated in substantial part – we would say predominantly – by Firestone’s desire to avoid organizing by the building trades unions. “Raid proofing” is an entirely accurate description of the strategy it followed.

It also presumes that it should always be open to two parties to agree to avoid the open periods set out in the statute because “raiding” may prove disruptive. That would be more convincing if it were not tainted by an air of “it’s disruptive because the guys I don’t want might win” aspect. The more their employer appears to have an interest in the process, the more unsettling the process becomes for the employees themselves, since some fear retaliation and others seek to curry favour.

One last point, and it will be alluded to again in the last chapter, is the several references to the Board. Whatever may be said of the panel’s legal conclusions, lack of understanding, given the detailed analysis, is an unjustified charge. The suggestion that

⁸³ That is the move from Firestone to HJB and back again.

the panel proceeded on a result oriented approach is equally unjustified based on the facts before the panel.

The Court of Queen's Bench upheld the decision. An appeal was launched but later withdrawn. Of the open period argument, the Court said:

[84] The applicants themselves identified free collective bargaining as an underlying principle of the *Code*. ... The Panel found that its prior interpretation undermined free collective bargaining through its potential for abuse. It also found that the regime of allowing two-year collective agreements to proceed unchallenged can only protect industrial stability when it is balanced with an opportunity for employees to maintain or change their bargaining agent. The Panel was not overlooking or re-characterizing legislative intent, but rather deciding that upon reflection, its prior interpretation of the *Code* undermined legislative intent. The Panel sought to interpret the *Code* in a way that better reflected the intent of *Code* as a whole.

...

The Panel's decision that open periods cannot be waived protects employees and employers alike. It does so by ensuring two-year periods of stability, while also protecting the ability of employees to exercise their rights in a meaningful way. This does not, as the applicants suggest, impede freedom to contract. Employees are free to re-contract with an incumbent union should they wish to do so. The open period incentivizes the incumbent union's efforts to protect the interests of the employees who it represents in contractual negotiations. Given the Panel's explanation of the negative effects of its prior interpretation, considered within the context of the *Code*, the Panel's reasons support its final decision, and that decision is reasonable in the factual and legal context of this case.

The Court also upheld the finding of an unfair labour practice. It emphasized the Board's point that:

"labour law is full of examples of legally permissible actions that become breaches of statute – unfair labour practices – in their particular factual context": *Re Firestone* at para. 250.

In that same paragraph 250 the Board had given, as an example, a warning from an earlier case:

Similarly, terminating a subcontract and substituting another may be legal, but if done to subvert the bargaining rights of the first subcontractor's trade union it is illegal: *CLAC v. J.V. Driver Installations Ltd. et al* [2000] Alta. L.R.B.R. 633.

This observation; that what is legal becomes illegal if done for the wrong purpose, is important. Too great a focus on the legality of the act, and too little attention to the legality of the motive involved, has permeated too many of the construction industry's disputes over the last decade. It is a reason to be cautious in recommending, for inclusion within the *Code*, what are characterized as "rights", but are in reality only powers that can be exercised unless carried out for an improper purpose. The restraints on undue employer influence and involvement were established or reinforced in response to the unions of convenience cases. Such restraints were certainly well understood by the time the events reported in *Firestone* arose.

The evidence is clear that, over the past decade a large majority of certificates have been granted for very small units in anticipation of further build-up. Proposals are advanced to have the "no build-up principle" entrenched in legislation, presumably so this practice can continue. It is further proposed that a union and employer be free to negotiate an early renewal of their collective agreement (subject to ratification by the employees) and by so doing close of the open period when another union could otherwise apply for certification. The building trade unions propose that s. 183 be redefined to provide a common contract end date for all construction agreements. This would provide for common and ascertainable open periods. The Coalition describes this approach as "unacceptable". Further, the Coalition proposes that no applications for certification of an already certified employer should be allowed at any time during the duration of a Division 8 project. These issues are assessed below.

Build-Up Principle

Should the legislation require that the Labour Relations Board not apply a build-up policy to certification applications in the construction industry, should it adopt the B.C. policy of applying it to all-employee unit applications, or should the issue be left to the Labour Relations Board to develop and apply the policy as it deems appropriate in the circumstances?

As a general rule, the Labour Relations Board will disallow an application where the workforce, at the time of the application is made, is significantly different from the regular or anticipated workforce. For example, a ski resort had 20 employees year round, but about 200 each winter. A certification application in October, when build-up was imminent, was denied.

In the past the Board has not applied a build-up principle in the construction industry, mostly because the workforce is inherently fluctuating. It relied instead, when first

adopting the policy, on the fact most construction employees were union members dispatched from a hiring hall and that, because of the ongoing commitment to supply union members, ongoing majority support could be assumed from that supply. That is an assumption that generally only applies to building trade unions.

In *Firestone Energy*⁸⁴ the Board expressed concern over the prevalence of organizing prematurely a small and unrepresentative group; a concern amply borne out by the facts in *Firestone* and by the certification statistics quoted above.

When many years ago the Board decided that the build-up principle should not apply in construction, there was little reason to fear that this could in fact inhibit employees' freedom to choose their bargaining agent. The building trades unions were really the "only game in town" at that time. Contractors generally either looked unfavourably upon union representation, or viewed a building trades certification as the price to be paid for access to work tendered by owners on a union shop basis. Employees decided to work union or non-union and took their jobs accordingly. Building trades unions generally observed their respective craft lines and did not compete with one another to represent employees.

[221] With entry into the construction industry of alternative multi-trade unions like CLAC, however, union representation there became a competitive activity. Certification by one union became a tool or a potential tool to block certification by others. Employers, either by collusion or by studied indifference to organizing by alternative unions, could pursue whatever competitive advantage they considered to exist from such a bargaining relationship. The certification application for a two- or three-person bargaining unit, met with silence or even apparent enthusiasm by the employer, has become absolutely commonplace in the construction industry. And while the unrepresentative constituency in many construction representation votes has long been a cause for concern for the Board, the evolution of the two- or three-employee certification application into a tool capable of inoculating employers against organizing by unions they do not wish to deal with has greatly elevated the level of that concern.

This is one of those circumstances where changes in the industry may well justify a change in policy to match those new circumstances. It is no longer accurate to assume that a certification application in construction will involve a true hiring hall arrangement.

CLAC accepts that build-up principles may have to apply to all-employee units if allowed, as is the case in B.C., but it opposes it for craft units. It would leave it as a Board policy without legislative control. The building trade unions would similarly see

⁸⁴ [2009] Alta. LRBR 134 at p. 220-221

it remain discretionary in the Board. The Coalition would prefer it in the *Code* for reasons of certainty, but recognizes it is possible to leave it to the Board's discretion.

Recommendation: That the matter remain an issue of Board policy but that the Board revisit and refine its application of the build-up principle to address concerns about premature organizing based on unrepresentative groups of employees.

There are times when small units in construction are quite natural, either generally or at particular times in the course of a project due to the fluctuating demands for trades as the project progresses. However, the practice of organizing just a few employees at the outset of a project, in the full knowledge that the employer intends to employ a much larger workforce, has brought the construction certification process into disrepute; the more the employer facilitates this process, the more this is true. The Board has correctly held that extending preferential treatment to one trade union to avoid the potential for certification by another is an unfair labour practice and contrary to the requirement that the union be genuinely representative of employees.

Small number certifications would be of less concern if they were not so often tied to what are essentially empty or disposable corporate entities designed to shield the "corporate structure" from certification and Registration. A revised board policy might usefully require an Employer, by sworn statement, and in immediate response to a certification application, to attest to the purpose to which the employing corporation will be put, and the anticipated size of the workforce it will hire to serve that purpose. This would allow the Board, very early in the process, to distinguish between naturally small units, and small units being certified in anticipation of meeting obligations on a larger project. If the latter, certification should be delayed pending the anticipated build-up. Wiring the "corporate structure's" winter plug-in's, but then switching to a major job like Suncor's MVU, should not pass muster.

To the extent a commitment to hiring only preexisting member employees justifies not using the build-up principle, early investigation could similarly ensure that such a labour supply system is genuinely in place. A practice of simply running employees recruited by the employer through a union office should be insufficient, while a standing practice of actually introducing and supplying members as employees should be.

The objective is that the initial certification process should once again command respect from the outset and be transparently free of prohibited employee interference or an employer's aversion to particular unions. The unfair labour practice provision alone has proved insufficient to guard against undue employer involvement.

Open Periods

The *Labour Relations Code* has traditionally tied the period in which employees can seek revocation of a trade union's certificate, and during which a union seeking to represent the employees can apply for certification, to the date the parties choose for the length of their collective agreement. While there are other timing restrictions, the open periods in question here are set out for certification in the following provision:

37(2) An application for certification may be made,

- (a) if no collective agreement or certification of a bargaining agent is in effect in respect of any employees in the unit, at any time,

...

- (d) if a collective agreement for a term of 2 years or less is in force in respect of any of the employees in the unit, at any time in the 2 months immediately preceding the end of the term of the collective agreement, or
- (e) if a collective agreement for a term of more than 2 years is in force in respect of any of the employees in the unit, at any time
 - (i) in the 11th or 12th month of the 2nd or any subsequent year of the term, or
 - (ii) in the 2 months immediately preceding the end of the term.

(3) Notwithstanding subsection (2), no application shall be made under clause (e)(i) of that subsection unless the application is made at least 10 months prior to the end of the term of the collective agreement.

Applications for revocation are subject to the same "open periods"⁸⁵.

The construction industry part of the *Code* provides common end dates for construction collective agreements by "a party to whom this Part applies".

⁸⁵ s. 52(3) and (4) of the *Code*.

183 Subject to Section 130, a collective agreement entered into by a party to whom this Part applies shall provide for the expiry of the agreement on April 30th calculated bi-annually from April 30, 1989.

The Board ruled, in 1991, in *Westbrook Electric*, that this section applies only to construction collective agreements under Registration and not others, even though within the construction industry.⁸⁶ The Alliance would like to see *Westbrook Electric* reversed and the April 30th termination date apply to all construction agreements. Making that change would align open periods throughout the construction industry, as well as provide common termination dates, which would serve to align non-registration bargaining with Registration bargaining. The Coalition is entirely opposed to the concept.

There is no particular need, for construction or generally, for open periods to be tied to the last two months of the collective agreement. Other provinces use different mechanisms to set these periodic opportunities to revisit the question of representation. B.C. for example, sets the open periods at the seventh or eighth month of each year of a collective agreement, but if an application is made, and decided on the merits, no other application can be made for 22 months⁸⁷. Tying the date to the end of the collective agreement links the representation issues with the economic issues involved in bargaining a new agreement.

The debate over open periods raises several issues. First, the Coalition and CNRL argue that there should be no opportunity at all to change bargaining agents in respect of employees on a Division 8 project. The assertion is that to do so is disruptive of the project. A Division 8 approval can last for a significant period of time. The current application for a Division 8 extension for CNRL could last for up to eight years. Suspending union rights to organize and employee rights to change or decertify unions for such lengthy period should require very significant proof of potential harm. Protections against union organizing have never been a part of Division 8 before. No significant evidence of even the potential for real harm has been put forward to justify such a step. The certification figures quoted above provide no support for the proposal and nor do the reported cases.

The argument against disruption in fact points to the opposite conclusion. Certification, as a system, is designed to prevent workplace disruption over representation issues. In the world of managed open sites, with competing contractors and collective agreements,

⁸⁶ *Westbrook Electrical Services Ltd.* [1991] Alta. L.R.B.R. 56. The Board declined to alter the ruling in *Building Trades Council v. Ledcor* [1996] Alta. L.R.B.R. 56 a decision upheld by the Court of Appeal.

⁸⁷ Section 19 of the British Columbia Labour Relations Code.

variations in terms and conditions and so on, it is highly likely representational issues will arise, and they are more appropriately resolved through the *Code's* certification and decertification processes than by sporadic outbreaks of job action. Under the proposals for Division 8 that follow, many of the agreements covering special or Division 8 projects would be covered by special parts of province-wide agreements, with the employees on the special project or Division 8 site falling within a larger bargaining unit. That consideration too speaks against any suspension of the certification and decertification system for Division 8 sites. It is recommended that no such proposal be adopted.

The next issue is whether the 1991 *Westbrook Electric* decision ought to be reversed. It was decided just a couple of years after the introduction of the 1988 *Code*. At that time, alternative unions were still a relatively minor presence in the construction industry. The decision viewed the common end-date provision for construction agreements as an adjunct to the new Registration consolidated bargaining cycle processes that did not involve alternative unions.

The broad policy question now is whether the advent of managed open sites, with not only Registration agreements in place but a variety of unregulated (in terms of end dates) agreements with alternative unions, justifies a change. The economic question: when should the contract negotiation period occur, with the potential for a strike or lockout, can be considered separately from the representation question.

The question on the economic side is whether allowing contracts to expire as and when the parties choose, rather than all at the same time, exposes too many construction projects to the risk that a lawful strike or lockout involving one bargaining relationship will disrupt the overall work of the project, or, once settled, will create undue economic pressures on other bargaining relationships because of the change in terms and conditions of employment.

These issues are dealt with for Registration; it is only alternative union contracts that present the issue. Currently, the chance of disruptive job action is low. How matters will change in the future is a matter of speculation and will depend on the degree of alternative union organizing and on the type of alternative union representation, if any, employees choose. Owners have a degree of commercial control over such risks, but the efficacy of that depends on the availability of alternative labour sources.

Of more significance are the proposals described in the next chapter that would validate, for both Registration and non-Registration bargaining relationships, the ability to provide for special needs agreements that can operate for a major site without becoming drawn into a broader province-wide dispute.

One further protection that remains, and should remain open to employers collectively, is the option to seek Registration for their relationships with any union for bargaining within the construction industry. While no one sees that as a realistic possibility now, it could become so if legal but “off season” work stoppages begin to disrupt the broader industry.

On the representational side, amending s. 183 to provide a set contractual end date would add some certainty to the open period. However, that date should in any event be certain and publicly known based on the obligation to file all collective agreements⁸⁸. This consideration alone does not justify limiting collective agreement end dates to those legislated for Registration bargaining.

The next issue is whether the ruling that statutory open periods are matters of public policy that cannot be closed-off by an early contract renewal ought to be reversed by statutory amendment. The *Firestone* ruling was reviewed by the Courts and upheld. The Board’s reasons and the Court’s reasons on review are cogent and well grounded in public policy. The argument that *Firestone* reversed a longstanding interpretation of the *Labour Code* was addressed fully both by the Board and the reviewing Court. It is an assertion that in any event is overstated. Longstanding authority from Saskatchewan made a similar finding for the statutory open period for giving notice to bargain. The s. 37 open period, while interpreted decisively in *Firestone*, was for a long time subject to debate in Alberta, given the importance of the certification process and the potential for abuse.

The recommendation is that open periods remains as they are now in the *Code* and that the Board’s ruling, as set out in *Firestone* and upheld by the Courts, not be altered by statutory amendment. There is no demonstrated necessity to alter the way open periods are currently calculated or to tie them, for non-Registration construction bargaining, to s. 183.

Post-Certification Bargaining

Should the Labour Relations Code be amended for employers engaged in the construction industry to eliminate the s. 40(3) right of a newly certified trade union to give 2 months notice to terminate a pre-existing collective agreement?

Section 40 of the *Code* applies to construction and non-construction situations. It describes what happens when one trade union obtains certification where a previously

⁸⁸ See s. 132

certified union negotiated a collective agreement that remains in force. The new certificate replaces the former certificate. Section 40(3) deals with the collective agreement. It provides:

- 40(3)** When a trade union becomes a certified bargaining agent for employees in a unit and at the time of certification a collective agreement is in force respecting those employees, the trade union
- (a) becomes a party to the collective agreement in place of the bargaining agent that was a party to the collective agreement in respect of the employees in the unit, and
 - (b) may, insofar as the collective agreement applies to the employees and notwithstanding anything contained in the collective agreement, terminate the agreement at any time by giving the employer at least 2 months' notice in writing.

The Coalition argues that subsection (b) should be eliminated for construction employees so that the newly certified union simply takes over the preexisting agreement without any opportunity to renegotiate terms. It advocates for the "B.C. Model" which provides that the prior collective agreement simply remains in force, with the old union relieved of its duties which are assumed by the new union⁸⁹. This, it argues, provides much greater certainty for a construction contractor, since the collective agreement upon which it is based cannot be changed, so as to undermine the cost assumptions upon which any contract bid was made. It argues that providing for this contingency adds cost to bids, making them less competitive and thus more expensive for the owner than they might otherwise be.

Several factors make the situation in Alberta different from B.C. First, this situation is only significant where the newly certified union is not covered by Registration. If the new union is a building trades union, the employer in Alberta becomes bound to the Registration agreement and s. 40(3) has no application. The equivalent argument for Registration is addressed in Chapter 11. Second, B.C. allows a certification application to be brought early in a collective agreement's term. In Alberta such applications cannot be made until the 23rd – 24th month of the contract or in its last 2 months. This ties the window period to the end of the collective agreement and, except in the case of long agreements, obviates the problem that underlies the proposal.

⁸⁹ British Columbia *Labour Relations Code* s. 27(1) (c) and 27(2).

The certification statistics above show there is virtually no occurrence of this problem now, and no examples were brought forward. It is recommended that no change be made to s. 40(3) at the present time.

Restrictions on Union Discipline

Should the Labour Relations Code be amended to prohibit a union taking action against a member who takes work elsewhere without the union's consent where the union has reasonable alternative work available to that member?

Joining a trade union is a contractual step that carries both rights and obligations under the union's constitution. The restrictions any particular union chooses to impose, as a condition of membership, will vary depending on the union's style of operation. Some are very loose, others are more proscriptive. Most censure members for activities that harm the organization, but there are differences on what the various unions perceive as harm.

Unions with hiring halls offer work to members, but only if those unions can attract offers of work through the contractors with whom they bargain. This, collectively, gives the union members an interest in acquiring union bargaining rights with construction contractors and in ensuring those contractors are supplied with employees who have the skills to perform the work in a competitive manner. As a result, many building trade constitutions require that their members, as a condition of continued membership, only work for an employer bound by a collective agreement, unless the union gives its consent to the employee working elsewhere.

An employee, by maintaining membership in good standing, is able to keep their health and welfare benefits current. Maintaining these benefits for a person involves cost and potential liability to the union as a whole. Similarly, maintaining active membership allows the employee to keep their pension options open whereas leaving the union, like quitting a job, results in the employee taking the commuted value of their benefits to date.

If an employee ignores such a constitutional provision, seeking to remain a member, but to work elsewhere without consent, they risk a charge under the union's constitution. A hearing is necessary with procedural rights including the right to legal counsel, but it may result in a fine, a suspension, or expulsion. While called a fine, it is only a fine

enforceable under the Union's constitution with payment becoming a precondition to future membership benefits. It cannot be collected by court action.⁹⁰

The *Labour Relations Code* recognizes that the union's right to enforce its constitutional rules; the burdens that go with the benefits of union membership have to be balanced against the due process rights and personal interests of the individuals involved. Section 152 of the *Code*, subject to any internal appeal mechanism the union may have, prohibits expulsion or suspension from membership or disciplinary action in a manner that is discriminatory. The *Labour Code* prohibits trade unions from disciplinary action for a number of other specific reasons⁹¹.

The section in question here deals with the restrictions specifically directed at an employee who, without consent, and while there is union work available, works non-union. Section 151(i)(ii) provides that:

151 No trade union and no person acting on behalf of a trade union shall

- (i) expel or suspend a person from membership in the trade union or take disciplinary action against or impose any form of penalty on any person

...

- (ii) for engaging in employment with an employer who is not a party to a collective agreement with the trade union if the trade union fails to make reasonable alternate employment available to that person within a reasonable time with an employer who is a party to a collective agreement with the trade union, unless the trade union and that person are participating in a strike that is permitted under this Act.

The Board, and subsequently the Alberta Court of Appeal, considered this section in *Armstrong v. Boilermakers Lodge 146*⁹². The Court concluded that the union could discipline a member for taking non-union managerial work and that the union had offered reasonable alternate employment considering the relative remuneration, length and stability of employment, and the category of that employment. The Court acknowledged the union's point that "it does not preclude [the member] from pursuing a career in management; rather, it requires him to obtain prior approval in accordance with the union's constitution if he wishes to remain a member while pursuing that career".

⁹⁰ See *TWU Local 202 v. Macmillan* [2008] A.J. 1179.

⁹¹ See section 151 and 152 for the specific sections.

⁹² [2010] ABCA 326

The Merit Contractors' Association points out that a significant level of public money goes into training a construction employee. But there is also a significant Union investment in training members. Training also comes from employers and from the Employment Insurance program. Merit emphasizes public policy conditions that favour employee mobility, saying "no one group can or should be able to lay claim to owning a worker". It argues that the use of internal union fines is confined to only a few unions, many others viewing it as wrong in principle.

The Coalition argues that employees regularly move from one employer to another regardless of their union affiliation and do so often, belonging to more than one union. In its view, for a union to enforce its constitutional provisions against an employee who does so interferes with an individual employee's rights. Further they argue that employee mobility is a part of both federal and provincial public policy, which favours flexibility in the workforce, and this includes the ability to move freely between contractors. Some building trade unions do not have or do not enforce these rules. "Alternative unions" they say, generally do not have such rules in their constitutions.

Restrictions like this are not confined to unions. In the private sector, it is quite common for employers to insist on "non-compete" clauses in their hiring agreements that restrict the work an employee can take with competitors once they leave employment. When an ordinary employee chooses to quit a job, they cannot hope to maintain the ongoing fringe benefits or claim a right to be rehired, on the basis of some notion of employee freedom of mobility. Similarly, it is not infrequent for ordinary employees to feel they cannot leave a particular job because they see their pension as "golden handcuffs".

The present law is restricted by the requirement that reasonable alternative work be available before any such penalty is imposed. The existence and use of the constitutional provision is one of the factors employees consider when deciding where to work and which union to support.

While the "fine" aspect of this issue is of concern, so is the proposition that a member of a union, having accepted its benefits and burdens, should be able as a matter of law, to maintain key benefits like health and welfare plan entitlements, pension eligibility and future rights to dispatch, while ignoring the burdens.

Recommendation: The provisions of s. 151 remain as they are now, as representing an appropriate balance between employee mobility and not allowing an employee to take the benefits of union membership without the burdens.

Chapter 10 Major Construction Projects – Division 8

Division 8, in Part 3 of the *Labour Relations Code*, makes special provision for mega-projects. It was rewritten, but without much explanatory documentation, in 1988, at a time when the only industry participants with the capacity to undertake such projects were under Registration. Others simply lacked the capacity for that scale of work.

Due to a changed environment, Division 8 has, it is generally recognized, proved inadequate. It has no clear provision for managed open sites. Efforts to use it in that environment attracted serious legal challenges, which have discouraged its use by other owners. That is defeating its primary purpose of giving potential investors an early and reliable assurance of stability.

History of Major Project Carve-out Provisions

Since 1973, Alberta's public policy has been to protect projects of sufficient size from being disrupted by strikes or lockouts in the rest of the construction industry. Such protection was only needed once Registration was introduced in 1970. Before that, strike and lockout free agreements could be negotiated between contractors and unions directly. Registration meant these contracts might get bound up in a Registration-wide dispute. Legislation in 1973 introduced Division 7.1. The Dubinsky Report, a year later, accurately described its intention and effect⁹³:

Bill 52 has reference to the construction of oil sands plants on lands described in a bituminous sands lease granted by the Province of Alberta, and essentially permits the primary contractor responsible for the construction of such plants to enter into a project or site agreement with building trades unions. Such collective agreements would pick up the terms and conditions of local agreements as they apply to wages, health and welfare and holiday benefits, but be bargained without reference to existing local agreements in respect of other conditions of employment. Such project agreement, when negotiated, is binding upon the principal parties thereto as well as upon all other employers engaged in the construction of an oil sands plant in the lease area at any time throughout the currency of the project. Such agreement is similarly binding upon the employees on whose behalf the trade union concerned has bargained such agreement, either at the time the agreement is concluded or subsequently throughout the currency of the construction program.

⁹³ Dubinsky Report, page 18

The bill was controversial, both provincially and nationally, representing "...an exception of substantial impact from the Registration provisions of the Alberta legislation". Dubinsky's concern was that it took away from the centralization of bargaining Registration was designed to achieve and could serve to undermine the exclusivity of bargaining rights of Registered Employer's Organizations.

That concern is still relevant today. Site agreements, excluded from Registration bargaining, can reduce the influence of employers at the bargaining table to the extent that the unions involved are able to lessen the pressure on their members during a strike or lockout by providing them with at least some work under these site agreements.

Further, if a Division 8 agreement provides terms and conditions less than, or more favourable than, Registration agreements, it can divert the supply of labour towards, or away from, that project. Employees choose what they perceive to be the most attractive jobs, based on wage rates as well as issues like job duration, location and per diem arrangements. In times of short supply those choices are significant to all contractors.

The 1987 review of the *Labour Relations Code* made the following recommendations, which were not followed.

N. Carve Out

The present provisions are applicable only if a request is made and accepted for a specific project in the oil sands area. The provisions have been implemented only once for the Syncrude plant. Other construction owners and contractors felt that their projects were delayed by any disputes during the carve out period and consequently feel subject to unequal treatment by the law.

Recommendation:

43. That the present provisions for carve out of oil sands construction projects be removed from the legislation.

Division 8 instead was redrafted. One significant change dropped the earlier provisions that had carve-out agreements "pick-up" the core wage and benefit provisions of the Registration collective agreements.

Issues over Division 8

A few, like CNRL, endorse Division 8 in its present form, although it too seeks enhancements. The broader consensus is that Division 8 is inadequate. A few believe the provisions are no longer needed at all as the Registration bargaining cycle has served for 25 years to settle all Registration disputes. Further, some argue, the newly negotiated “special project needs agreements” (described below) address the no-strike no-lockout issue.

The majority view is that some Division 8-like process should remain available, if needed, particularly now that such projects predictably involve managed open sites. Attitudes to Division 8, to its problems and to potential solutions, have to be understood in the context of the provision’s use in 2004. That is when Canadian Natural Resources Ltd obtained a Division 8 designation for its Horizon Oil Sands Project located about 80 kms north of Fort McMurray.

The CNRL Experience

Different parties have quite different views of what happened and why. Some view it as building trade inflexibility being overcome by competitive alternatives. Some see it as Division 8 being deliberately used to provide alternative union and non-union contractors with an advantage, in a way that Division 8 never contemplated.

The CNRL proposal involved a major financial undertaking presenting great opportunity for businesses that became involved. Initially estimated at \$6.8 billion, in the final analysis it cost \$10.9 billion and consumed about 52 million hours of labour.

Some owner attitudes were changing, with growing concern over cost overruns and scheduling delays. By 2004, several contractors had developed new capacity and experience, particularly through having obtained a greater share of work in the commercial and pipeline sectors. That growth paralleled the development of relationships with, particularly, the Christian Labour Association of Canada, with whom many had entered into voluntary recognition agreements and to which others became certified. Thus; new players had increased capacity, labour relations arrangements outside of Registration, and a desire to obtain a foothold in the heavy industrial construction area.

CNRL received Division 8 approval in the form of the following Regulation⁹⁴:

Designation of project

⁹⁴ Alta. Reg. 264/2004 Horizon Oil Sands Project Designation Regulation

2 For the purposes of section 196 of the Code,

- (a) the project known as the Horizon Oil Sands Project is designated as a project to which Division 8 of Part 3 of the Code applies,
- (b) Horizon Construction Management Ltd. is designated as the principal contractor of the Horizon Oil Sands Project,
- (c) Horizon Construction Management Ltd. is authorized to bargain collectively in respect of the Horizon Oil Sands Project, and
- (d) the scope of construction in respect of the Horizon Oil Sands Project to which a collective agreement under Division 8 of Part 3 shall apply is all construction work until completion of phases 1, 2 and 3 of the Project.

It authorized Horizon to “bargain collectively”. What that meant has to be read in the context of the provisions in Division 8. In particular, Section 197(1) provides that the bargaining is to be with any trade union that is a bargaining agent of the employees.

197(1) Subject to subsection (2) and the regulations under section 196, a principal contractor designated under section 196 may engage in voluntary collective bargaining on the principal contractor’s own behalf and on behalf of any other employer engaged in the project with any trade union that is a bargaining agent of the employees of the principal contractor or of the employees of those employers referred to in this subsection.

As described already in relation to Unions of Convenience, to be a “bargaining agent” the trade union in question must be acting in a representative way on behalf of the employees involved. It is not sufficient to be a trade union in the abstract. Section 198, which binds employees to the Division 8 agreement (or agreements) uses the same phrase, presumably with the same connotation of “acting in a representative capacity”.

198 A collective agreement entered into between a principal contractor and a trade union under this Division is binding on

...

- (e) the trade union, to the extent that the trade union is the bargaining agent for employees of the employers referred to in this section and to the extent that those employees are employed in the designated project, and

- (f) the employees on whose behalf the trade union bargained collectively and who become part of the bargaining unit of the trade union, to the extent that the employees are employed in the designated project by the employers referred to in this section.

However, some other provisions, particularly those binding additional contractors to the site agreement, suggested an interpretation allowing a principal contractor to sign-up with one union and bind all other unions to that contract⁹⁵. Some view this interpretation as one legitimately held at the time. Others view it as a “needs must” interpretation advanced mainly to put pressure on the building trade unions who stood to lose the work to alternative union contractors.

Histories differ on what happened. The CLRa entered into negotiations with the building trade unions to try to arrive at terms it could present to CNRL on behalf of its contractors for work on the site. Mr. Herb Holmes of the CLRa led the REO bargaining on this. His account was usefully summarized in testimony before the Labour Relations Board in the *Driver Iron* case⁹⁶ discussed in Chapter 11.

[9] ... Mr. Holmes, on behalf of CLRA, was involved in negotiations with the Alberta Building Trades unions in respect to work to be performed at the Horizon Oil Sands Project (the “Horizon Project”). The Horizon Project is designated a Division 8 project under Part 3 of the *Code*. It was a significant project employing 10,500 workers at its peak. CLRA was hoping to arrive at satisfactory terms with the Building Trades unions it could present to the principal contractor and owner of the project in order to secure work on the project for the contractors it represents.

[10] From Mr. Holmes’ perspective the negotiations were reaching a critical stage when the owner of the project abruptly terminated the negotiations. Shortly thereafter Mr. Holmes learned the Ironworkers Local 720 had entered into an agreement directly with the primary contractor on the Horizon Project. ... Mr. Holmes viewed the terms of these agreements as more favourable to the contractor than had been offered by Ironworkers Local 720 in the negotiations CLRA participated in.

[11] The contractor members of CLRA were upset they were frozen out of the work on the Horizon Project. However they concluded that since the Horizon Project was designated a Division 8 project they were without recourse.

Another account, advanced on behalf of the Coalition in support of its proposals, is that CNRL could not, initially, gain a project agreement with most of the building trade

⁹⁵ Primarily s. 198(d), 199(2) (b) and 200(1) (c).

⁹⁶ CLRa v. Driver Iron Inc. et al [2009] Alta. LRBR 26 at 31

unions (except the Ironworkers) so they turned instead to the Christian Labour Association of Canada. This account suggests:

CNRL gained site designation under Division 8 for their Horizon Project, but proceeded to bypass the BTU's (excepting the Ironworkers) in establishing project agreements with CLAC, CEP and the Ironworkers. The other BTU's were simply not prepared to enter an agreement and, as a result, HCML (the Principal Contractor) maintained that the Project Agreement concluded with CLAC, etc., was binding on all contractors whose employees were members of those unions as well as being binding on contractors whose employees were members of the BTU's. The BTU's contested this and maintained that this interpretation was unconstitutional.

CNRL's position is that, early on, they elected to proceed with a managed open site, which they felt necessary giving the massive and diverse labour supply requirements. They describe what followed:

Initially, Canadian Natural attempted to negotiate a "project agreement" under Division 8 with the Building Trade unions. Once those negotiations were underway, Canadian Natural began negotiating a second "project agreement" with the Christian Labour Association of Canada ("CLAC"). At one point in early 2005, Canadian Natural believed that it had achieved both, but our negotiations with the Building Trade unions collapsed. As a result, Canadian Natural concluded a project agreement with CLAC. Subsequently, Canadian Natural also concluded project agreements with the Communication, Energy, and Paperworkers Union ("CEP") and Local 720 of the Ironworkers Union on substantially similar terms. Canadian Natural took the position that the terms of the CLAC project agreement applied to all contractors working on the Horizon Project and all of their respective employees regardless of union affiliation unless those unions had also entered into project agreements for the Horizon Project. (emphasis added)

The last sentence is particularly significant. It is this position, controversial at best, that most offended the building trade unions, even before the *Charter* issue was more directly raised following the *B.C. Health* decision in 2007. It was the inability to challenge this controversial legal position, during the Division 8 approval process, that elevated concerns over the process used in obtaining the designation.

The CLAC-Horizon collective agreement signed March 30, 2005 clearly reflected the view that CLAC could bargain an agreement to cover employees with whom it had no bargaining relationship. The preamble read:

(g) The Parties recognize that one of the underlying purposes of Division 8 is to remove the possibility of labour disruptions at major construction projects designated as projects under Division 8;

(h) CLAC is the bargaining agent of Trade employees of HCML;

(i) The Parties wish to enter into a collective agreement pursuant to Division 8 for the Project; and

(j) The construction of the Project can best be achieved by having certain terms and conditions of employment apply to HCML, as the principal contractor, and to all employees in all Trades and their Employers. Accordingly, the Parties have structured and adopted language to recognize different relationships among the various Employers, Unions and Employees, as well as various collective agreements and bargaining relationships.

NOW THEREFORE in consideration of the premises and the mutual covenants and agreements hereinafter set forth, HCML and CLAC have agreed to the following terms and conditions that form a collective agreement pursuant to Division 8 in respect of the Project.

Article 1.4.1 provided:

1.4.1 The Parties have entered into this Agreement as a means of achieving uniformity in respect of certain terms and conditions of employment for Employees, while respecting other terms and conditions of employment in collective agreements entered into by CLAC, the Building Trade Unions, and terms and conditions of employment applicable to Non-Unionized Employees. The remainder of this Agreement is divided into the following Parts:

Article 2.10 – “Site Stability”, set out commitments between CLAC and Horizon that regulated a variety of issues likely to involve inter-union rivalry, including the ability to bar from the site any unions that disciplined their members for working under the agreement. Part 4 of this CLAC agreement with Horizon was headed “Additional Terms and Conditions Applying to Building Trade Employees and their Employer”. It provided (without any building trade or REO involvement) that:

4.1.1 Building Trade Collective Agreements for various Trades working in the general construction sector of the construction industry are referenced in Appendix 4. Subject to Article 4.1.2 below:

- (a) The terms and conditions of these agreements will apply to Building Trade Employees Working in the Trades specified in the agreements, and to their Employers;

It also, however, excluded the operation of certain of the Registration agreement's terms. While building trade members worked on this site, those members expressed discontent about having to work under terms negotiated by CLAC rather than by their own unions.

The building trade unions complained to the Labour Relations Board that the CLAC agreement did not and could not bind them, challenging the position CNRL was advancing. In June, 2005 the building trade unions filed a court motion challenging the process used in granting the Division 8 approval, in which they had not been involved. They maintained, in essence, that it had been pushed through behind closed doors. In 2007, the Supreme Court of Canada issued its decision in *B.C. Health*⁹⁷ about freedom of association. The building trades then amended their claim to include a *Charter* challenge to all of Division 8 and the CNRL approval.

Pressures mounted to resolve the entire dispute. As an aside, it is worth noting that, throughout the same period, the building trades were contesting some of the certification applications being brought by CLAC, which were yielding bargaining relationships some of which were intended to be used on the CNRL site. The *Firestone* case was only one such dispute, although the most comprehensive⁹⁸. The challenge to the CNRL Division 8 declaration involved three core issues:

1. The lack of transparency, lack of notice, and a chance to be heard over the application, including the inability of the building trade unions to object to or influence what was being proposed.
2. The interpretation of Division 8 in a way that allowed an agreement made with CLAC to bind employers with agreements with the building trade unions, those building trade unions, and their members, to CLAC's agreement.
3. The validity of Division 8 of the *Code* and the specific Division 8 designation based on the argument that it offended the *Charter* right to freedom of association.

Settlements were negotiated to this dispute including the challenges under the *Charter* of Rights and Freedoms. The settlements included:

⁹⁷ See Chapter 4.

⁹⁸ The *Firestone* complaints as filed involved both the Suncor MVU project and CNRL.

1. Acceptance by the Minister of a new protocol for considering future Division 8 applications.
2. Agreement by the building trade unions to enter into Division 8 project agreements on their own behalf with Horizon, thus avoiding, but not resolving, the representation issue.
3. Withdrawal of the challenges to what had been done before.
4. Agreement to support future requests to extend the CNRL Division 8 approval to new phases of the project.

Fundamental differences remain about what Division 8, as currently written, allows. Few purport to understand it completely, and amongst those that claim to, there remain differences as to whether, as currently worded, it can withstand *Charter* scrutiny. CNRL endorses Division 8 in its present form. No Court has had to rule on whether a principal contractor on a designated site can enter into a collective agreement with a single union that does not purport to represent many of the employees who will be involved on the project. Nor has any Court had to say, if that were allowed, whether it would breach the employees' *Charter* right to freedom of association.

What can be said with some confidence is that such a result was not contemplated when the provisions were written in 1988, but neither was it written so as to preclude such a possibility.

The Aftermath of the CNRL Dispute

CNRL itself says:

Although the various legal proceedings referred to above were the result of rather unique circumstances, our view is that other project owners have not pursued a Division 8 designation in respect of their projects for fear that they would face similar proceedings. As a result of this threat or risk, the use of Division 8 has been tainted.

It attributes this to widespread misunderstanding. However, it appears to be less misunderstanding than the view that the way Division 8 was used initially probably overreached its intended purpose. The assertion that CLAC had the capacity to bargain for building trade union members engendered a great deal of mistrust. Equally significant is what it did to the contractors who, had a building trades agreement been reached, would have been in a better position vis-à-vis CLAC affiliated contractors, to

obtain work on the project. The disputes were indeed settled when the building trades came on board. However, in the intervening two years, those contractors with CLAC, Ironworker or CEP affiliations obtained a clear competitive advantage over those covered by Registration.

CNRL's decision to proceed in the way it did with the project raised several major issues. First and foremost was the Charter and Division 8 litigation, which involved the Province and many others. This alone had a major negative effect on Division 8's reputation. Other issues included the disputed relationship between the Ironworkers and at least Driver Iron, contested certification processes with some CLAC contractors, and the unresolved arguments about CLAC negotiating for and binding the building trade unions.

Process Issues

As an integral part of the overall settlement, the then Minister of Employment and Immigration prescribed conditions under which future Division 8 applications would be received and processed. It reads:

Labour Relations Code, Part 3, Division 8
Major Projects Protocol

1. Pursuant to s. 195(2) of the *Labour Relations Code*, the following is prescribed as the information that shall be contained in an application under s. 195(1):
 - (a) Name and contact information of the person making the application, and the owner of the project.
 - (b) Description of the project, including its location and anticipated duration, including proposed phases where applicable.
 - (c) Rationale for designation of this project under Division 8 in comparison to other similar projects.
 - (d) Scope of construction industry involved in the project.
 - (e) Estimated cost of the project.
 - (f) Economic impact of the project on the economy of Alberta, including the estimated number of employees to be engaged during and after construction.

- (g) Details of established collective bargaining relationships that would be affected, together with contact information for relevant bargaining agents.

2. Any application under Division 8 is subject to and shall be governed by the following Protocol:

- (a) upon receipt of the application, the Minister will give notice and provide copies of it to such organizations as the Minister reasonably believes could be affected, including trade unions and registered employer organizations;
- (b) any organization that receives notice under paragraph (a) above shall be entitled to submit written submissions to the Minister within the time allotted by the Minister;
- (c) the nature and format of submissions under (b) above are entirely within the discretion of the party submitting them, but shall be prefaced by an executive summary;
- (d) upon receipt of submissions under (b) above, the Minister shall provide copies to the applicant and to all organizations mentioned in (a) above, to the extent that they have not already received copies;
- (e) the applicant and all organizations who receive submissions under (d) above shall be entitled to submit written replies, to be delivered to the Minister within the time allotted by the Minister;
- (f) after reviewing the application material, together with any submissions and replies, the Minister may make a decision under s. 195(3) of the *Labour Relations Code*.
- (g) notice of any decision by the Minister under s. 195(3) shall be provided to the applicant and any organization under (b) above;
- (h) in the event that the Minister forwards an application to the Lieutenant Governor in Council, the Minister shall also forward all submissions or replies received under (b) and (e) respectively.

3. This Protocol shall be effective immediately and shall remain in full force and effect until varied by the Minister.

There is general consensus that this protocol satisfies the procedural problems except for lingering uncertainty about the timelines involved and just who is responsible, within government, for decision-making. What used to be a discreet Ministry of Labour has

now become a relatively small part of the huge Ministry of Human Services. Having a named official or person responsible for marshaling submissions, hearing objections, and reporting to the Minister, within a designated timeframe, would give more focus and transparency to this otherwise agreed upon process.

Developments since the CNRL Settlement

The REO's and the building trade unions have sought solutions to the special needs of project owners, needs they are anxious to accommodate within the scope of Registration bargaining. Their solution takes the form of "Special Project Needs Agreements" discussed under the next heading.

Some of the members of the Coalition, CNRL, and perhaps others, sought advice on how Division 8 might be revised to more adequately meet their needs. Their lawyer prepared a proposed redraft.

Recently CNRL has submitted an application to have its existing Division 8 designation extended for the remaining stages of the project. That application has the support of all the unions now involved including the building trades, CEP (Unifor), CLAC and others. That extension request appears to be uncontroversial. If granted, its provisions should continue for that project despite any subsequent legislative change.

Special Project Needs Agreements

The building trades and the REO's in general construction went through a transformational round of collective bargaining after difficulties in 2007. With the assistance of departmental officials and of facilitator Lyle Kanee, they adopted a new bargaining protocol involving strict timelines and consensus bargaining. They were able to negotiate longer agreements, essentially two back-to-back agreements extending four years in total. They have included wage variables based on the price of oil. In addition, they developed two templates for what have become known as "Special Projects Needs Agreements" (SPNA's).

These agreements provide terms that purport to survive the end of a Registration agreement and continue to provide terms and conditions of employment, without any strike or lockout on the project, even if a strike or lockout occurs provincially. Each such agreement, and many have been entered into, use the basic Registration agreement's terms, but extend those terms for the duration of the specific project, foregoing any right

to strike or lockout. In addition, they contain a series of what are called “Harmony Provisions” introduced as follows:

The parties agree that in order to achieve appropriate working relationships amongst the various employers and Local Unions working on any work to which this Agreement apply, the following conditions shall apply and if any conflict exists between these conditions and the terms of the Collective Agreement between the Employers’ Organization ... and the Local Union, this Agreement shall prevail:

The agreement then goes on to provide for the type of common terms that are necessary to make a large project work without union conflict such as: hours of work and scheduling, including fly-in arrangements, reporting for work, shift cycles, overtime and designated days off, travel and transportation, local residents, and accommodation.

The agreements contain elaborate terms intended to make sure these specific project agreements indeed span, and protect the project from, any labour disruption involving Registration bargaining, continuing work (during any provincial stoppage) under the prior agreement’s terms, and then picking-up the terms of the new agreement once it is settled. It is the opinion of the building trades and the REO’s that these agreements are valid and binding. The Alliance adds, in respect to SPNA’s.

Each provides no strike/no lockout protection for the respective projects. Each of the SPNAs afford the respective owners the prerogative to apply for Division 8 designation, undertake that the respective organizations will support such an application, and pre-agree that the terms of the respective special project agreements or SPNAs will form the project agreement under Division 8. In our view, these SPNAs afford added value to the owners. One compelling interpretation of the provisions of Division 8 would suggest that while a designated project is protected from strike or lockout arising out of the negotiation of the project agreement, until the project agreement is entered into in respect to any trade jurisdiction, the project is not protected by a strike or lockout arising out of registration bargaining in respect to that trade jurisdiction. By affording the owner pre-agreed terms for a project agreement, the owner is guaranteed the project can be protected against strikes or lockouts arising out of registration bargaining.

The projects covered by these agreements involve almost all of the major projects and project owners in the province.

The Coalition advances its own and different proposals for Division 8, described next. However, the legal opinion prepared for and circulated by that group took issue with the SPNA’s that had been entered into by the members of the Alliance. It expressed the

opinion that, since SPNA's are negotiated as part of Registration bargaining, they are subject to s. 183 of the *Code*, which provides:

Subject to Section 130, a collective agreement entered into by a party to whom this Part applies shall provide for the expiry of the agreement on April 30th calculated bi-annually from April 30, 1989.

The opinion is that, given this provision:

If the re-negotiation of a registered collective agreement leads to a strike, the registration collective agreement terminates and because the Special Needs Agreement is part of the Registration Agreement, it also terminates regardless of the fact that it may, by its terms, say that it is to continue in force. This occurs by operation of law.

It is an arguable point although there are competing arguments that some of the added terms in the SPNA's overcome this barrier. These competing legal opinions have become just another part of the ongoing promotion, by each group, of their own position. What is clear is that, should such a strike or lockout occur, no owner wants the issue to disintegrate into legal uncertainty. The solution is to craft legislation now and avoid work disruptions and lawsuits later.

The Coalition proposal is to achieve this only through changes to Division 8. However, it is equally possible to give legislative certainty to the SPNA's so that they are given statutory force during any strike or lockout period, and become a specific exception to s. 183. Proceeding that way avoids both the legal barriers raised as well as some of the timing and procedural difficulties with the Division 8 process.

The Coalition Proposals

The Coalition argues that Division 8:

... provides a framework that: (i) allows project owners to establish a project collective agreement so that all non-union workers and those from all construction unions work side-by-side on the project with harmonious terms and conditions of employment; and (ii) avoids strikes or lockouts for the duration of the project. The attendant benefits of this approach on project costs and schedule can be significant. However, there is some hesitation to use this section of the *Code* due to a risk that some interpretations of Division 8 may invite litigation and violate the Canadian Charter of Rights and Freedoms. Amendments to Division 8 could open up greater opportunities to use Division 8.

Coalition Recommendation: Amend Division 8 to clarify and improve the language of these sections in order to improve the utilization of this Division.

Point (i) rather presumes that Division 8 was written for managed open sites, which many believe it was not. However, given current circumstances, most concede that it should achieve that goal for the future. Also, no one disputes the object of a Division 8 designation is to provide a strike and lockout free project, and particularly that the project is to be excluded from any province-wide Registration dispute.

The reference to the hesitation of others skirts the issue of why, in 2004, CNRL was of the view that the legislation allowed them to negotiate with CLAC for an agreement that would, by law, bind the building trade unions, the contractors and others.

The opinion of counsel for the members of the Coalition and CNRL included draft legislation written to overcome perceived “deficiencies”; which were the need:

1. to resolve the constitutional issues;
2. for an owner to be able to secure a project agreement with all unions that will work on the site;
3. to ensure that maintenance strikes for partially completed aspects of the project cannot occur;
4. to prevent raids (union organizing) taking place at different times throughout the project; and
5. to legislate against strikes or lockouts during construction.

This list adds features never before a part of the Division 8 provisions. It has never, in the past, covered maintenance issues and it has never suspended the certification or revocation processes. Points one and two can be considered together. The “constitutional issue” only arises from the effort to use an agreement with one trade union to bind other trade unions that the former does not represent. The interpretation of Division 8 that gives rise to those issues is not clear on the face of the existing language, which requires the trade unions to be “bargaining agents”. Point 2 implies that a Division 8 agreement might be intended to force participation in a Division 8 project. Rather, the contractual consent of the employer is still necessary, and terms still

have to be reached with the unions in question. Division 8 presently speaks of engaging in “voluntary bargaining”.

The potential for maintenance strikes is the subject of another chapter, but it should be noted that other strikes as well can disrupt a construction project; the airlines that fly in employees, the buses that drive them, the food deliveries that feed them and so on. Some line needs to be drawn as to how far the Division 8 protections have to go; to this point the prohibitions have been aimed only at construction work on the project and no objective evidence has been put forward to justify extending the provisions further afield. There is little reason why maintenance work on a construction project should be protected yet maintenance work on an equally important producing plant; one yielding royalties, should not. The *Code* already provides protection should a maintenance strike cause disruption in construction work. No such disruption has occurred for 60 years.

The last point is only necessary if there is some legal doubt about the existence of a binding collective agreement. If there is none, striking during the course of such an agreement is in any event prohibited. However, it is generally conceded that the whole purpose of a Division 8 designation is to achieve that goal, so the principle itself is not controversial.

Recommendations for New Special Projects Legislation

A review of all the submissions and discussions on this topic suggest that the objectives of Division 8 would be best achieved by new legislation adopting a different approach from the past.

The broad objective is to provide assurances to potential mega-project investors that they will not become embroiled in broader labour disputes such as a lawful work stoppage under Registration. There is virtually unanimous support for no-strike no-lockout protection for mega-projects for their duration. The issue is how best can this be achieved?

There is a general recognition that some mega-projects will be constructed on a managed open site basis. Steps must be available to ensure that the owner, or the owner's principal representative, can achieve those terms and conditions of employment that need to be uniform across the site. Days off work and shift arrangements are but two examples of terms that require uniformity, if different trade units are to work together efficiently on site.

Most accept the view advanced by the Alliance and by CLAC that, rather than having one or more project agreements prevail over their province-wide agreements, those province-wide agreements should be the foundation for the terms that govern a mega-project. This, except to the extent they have to be adapted to achieve necessary common site conditions and project harmony. There is a general consensus that such common site conditions should not alter basic features of their province-wide agreements (whether under Registration or not). In particular, this includes their health, welfare, pension and dispatch arrangements but also those other terms that are able to operate effectively despite specific project needs.

There is strong support from the Alliance and from CLAC for voluntary arrangements where possible. That is, by accommodating major projects by agreement within or ancillary to their existing provincial agreements. If this can be done successfully, it avoids the need for more formal declarations of the type currently provided for in Division 8. For alternative union agreements with employers, this is relatively easy to achieve. For Registration agreements, it requires that the difference as to the enforceability of such agreements be decisively resolved. That, in turn, requires an answer to a basic policy question.

A Registration collective agreement is negotiated by an R.E.O. It must be ratified by contractors under the R.E.O.'s rules. However, the potential exists that the agreement thus arrived at will bind individual contractors who disagree. In the past, such agreements have lasted two years, or sometimes four years, under the Registration bargaining cycle. Through Special Project Needs Agreements, the R.E.O.'s and the building trade unions have indicated a willingness to negotiate agreements extending beyond the Registration agreements' term. Those agreements are intended to operate, for agreed upon sites, even if there is otherwise a provincial work stoppage. Should the legislation be amended to endorse such extended agreements?

Three considerations arise. The first is whether too many such agreements will mean that any province-wide dispute becomes of such minimal influence that Registration bargaining may fail. Basically, if unions can keep all their employees working on special projects, are the employers left with any real leverage in the event of a dispute? The R.E.O.'s believe this concern is outweighed by the benefits. The need to adjust the contract's terms not only province-wide but also for any ongoing special projects, will keep bargaining healthy. They also point to the success of coordinated Registration bargaining over the last 25 years.

The second question is whether there should be any statutory limitation on the type or size of project to which such agreements might apply or whether, instead, it is sufficient

for the R.E.O.'s and building trade unions to decide that for themselves through bargaining.

The third question is whether it is appropriate to extend the "majoritarian principle" to allow bargaining for such extended agreements. When signed, they enable any employer bound by Registration to contract on the project in question under the same terms, although none are required to do so.

None of these public policy issues appear sufficient to override the advantages of allowing such agreements, if and when the parties to Registration choose. There appears to be no overriding public interest that requires statutory control on the size of the project to which it might relate.

It is therefore recommended that specific legislation allow collective agreements in the construction industry to provide, within or as an addendum to those collective agreements, provisions to cover special project needs. Legislation should provide.

1. Parties to a collective agreement that covers work while the parties are engaged in the construction industry may make provision for special projects or programs of work in the following form.

- (1) The parties may agree that the terms provided for in the agreement will continue, notwithstanding the agreement's expiry by reasons of a strike or lockout, without stoppage of work, for specified projects or programs of work identified in the collective agreement. Once the parties reach a new or revised collective agreement, those new or revised terms will apply to the work on the specified project or program of work.

- (2) In the case of a collective agreement between a Registered Employers Organization and a Group of Trade Unions, such agreements for special projects or programs of work will continue notwithstanding s. 183 of the *Labour Relations Code* and continue to bind the parties bound by the Registration agreement notwithstanding any strike or lockout and notwithstanding s. 183 of the *Labour Relations Code*.

- (3) Employees working under an agreement referred to in this section, during any strike or lockout, remain part of the bargaining unit, but shall not be eligible voters in any strike vote or proposal vote while they remain working.

These special needs agreements, whether under Registration or otherwise, should serve to accommodate most major projects. However, they would be voluntary and may not, in some circumstances, give sufficient assurances to project proponents that their need for common site conditions can be met.

What should the legislation make available in the event that voluntary agreements prove insufficient? There are three challenges. The first is to determine the type of project that should be eligible for such coverage. The second is to determine what common terms are necessary, and for which employers and employees. The third is to embed such terms in the appropriate collective agreements. All this needs to result in agreements that provide no-strike no-lockout coverage for the duration of the approved project.

The recommendations for achieving this are basically as follows.

1. Every collective agreement between parties engaged in the construction industry should be deemed, by legislation, to include a provision that, if it is to be used to cover work on an approved project, the parties will bargain in good faith for an addendum to cover that work by including any necessary common site terms. Failing agreement, such provisions would be arbitrated.
2. An application for designation should include proposed common site terms. The approval, following a mediated approval process, should establish these necessary common terms. Once approved, those terms would trigger the obligations in paragraph 1's bargaining and arbitration processes.

The approach of the existing Division 8 is to allow for the negotiation of collective agreements specific to the site. Sites are likely in future to be managed open sites with building trades, alternative unions and non-union employees. Trying to create one agreement in such circumstances, by definition, involves conflict with existing bargaining agencies. This alternative approach, with less difficulty, considers the different interests and needs, and accommodates them within the framework of the existing bargaining agencies and collective agreements.

Mega-projects require certain uniform terms. Generally speaking, one cannot have different trades working different shift schedules or taking different statutory holidays. The challenge is to achieve a consensus, or failing that a clear ruling or direction, on what common terms are needed and then to have them incorporated into the various agreements under which employees will work. The owner has considerable scope to

impose such terms by commercial arrangement; put simply, "if you want to bid, here are the terms you must accept and work under". That is sufficient to deal with construction companies who are not unionized. Unionized contractors (building trade or alternative) would have to ensure they can meet the terms under their existing collective agreements. Division 8 currently "carves out" the entire project from those existing agreements and replaces them with Project Agreements.

This alternative mechanism would continue to recognize all the existing agreements, but require that, for any work done under those agreements, those agreements must be modified for that project to conform to the project's requirements. This solution fits more comfortably with the difference in union affiliations, because it preserves the terms of the existing agreements that are compatible with the necessary common site conditions, but requires modification for those that are not. This is similar to the model described above for special project needs agreements.

It also allows flexibility to accommodate the special needs of some of the smaller specialty contractors and their unions. Some perform work that is almost entirely independent of the major project, or is performed in a short concentrated period. Refractory work, non-destruction testing, and elevator construction are a few examples. The model would mandate the negotiation of necessary terms, but not force them in circumstances where they are not necessary.

The designation process would work as follows:

- A project of sufficient economic advantage to the Province should be able to apply for special protection from strikes or lockouts involving those contracting to provide construction work on the project, to last for the project's duration.

Some suggest that the legislation should preset a size (in terms of dollar value or anticipated person hours) to qualify. This, it is suggested, would add certainty and avoid delay. However, there is no indication that in the past this has created any significant barrier to an application. Initial estimates of a project are inherently imprecise. Some projects may be sufficiently significant to warrant consideration, even if legislated thresholds are not met. The recommendation is to leave this as essentially a political decision, but one informed by a Commissioner's advice.

- A project owner, or the owner's agent, would apply for Division 8 designation. That designation, once granted, would establish those specific provisions needed to ensure that all contractors and employees work on the site in an efficient, harmonious and coordinated way.

- The application would include all the items listed in the existing Major Projects Protocol plus a description of the common project terms sought and a description of why they are necessary.
- The process for investigating the application should be assigned to a designated official called here a Commissioner. The Commissioner's role should include a mediation function. It should also include all the notice and other procedural steps set out in paragraph 2 of the protocol.
- The Minister, in appointing the Commissioner, should establish a timeframe for the Commissioner's duties.
- The Commissioner should have an ongoing role, and the same protocol and procedure should apply to any sought-after modifications to the necessary common terms included in the original approval.
- The Commissioner's task would be to make recommendations to the Minister (or perhaps directly to the Lieutenant Governor in Council) over whether the site should be designated, including a description of the project's scope and end date. It would also involve, after such inquiry or hearings as may prove necessary, establishing the list of necessary common terms and to which trades they should apply.
- The Commissioner would have the option of reporting to the Minister that, based on agreements arrived at voluntarily through mediation, either no designation is necessary, or that an agreement as to common terms, negotiated by sufficient affected parties, be adopted as part of the approval.

The requirement to set out the sought after common terms at the outset, plus the mediation role, would allow affected parties to commence negotiations under their existing collective agreements for suitable addendums. The legislation would mandate this by providing the following.

- It would be a deemed term of every collective agreement involving an employer engaged in the construction industry that, notwithstanding the agreement's term, either party can initiate good faith negotiations for an agreement addendum that will provide for:
 - (a) the incorporation of the Division 8 project's approved common terms;
 - (b) the extension, notwithstanding a renegotiation of the agreement, of an addendum for the duration of the Division 8 approval, without strike or lockout;

(c) the arbitration of any difference over that addendum, and for any approved alteration or extension of that Division 8 approval.

- That the project owner or the owner's agent should have notice of and the right to appear and make representations at any arbitration under the deemed provisions as it affects their interest in the necessary common terms.

The inclusion of the duty to bargain in good faith over these issues should serve to expedite the bargaining process and, in most cases, no arbitration should prove necessary.

All such agreements would have to provide no-strike and no-lockout provisions for work on the project. This means the addendum, for the site, would extend, uninterrupted, for the work on the Division 8 project, even if the remainder of the bargaining unit struck or was locked out. While this sounds technically difficult, it is what the CLAC-Horizon project and earlier Division 8 agreements essentially involved. It is also what the SPNA's provide. The employees on site simply picked up any renewed agreement once the off-site (usually Provincial) work stoppage ended.

It is also very similar to the model used under the *Canada Labour Code* to ensure that essential services are maintained during a strike or lockout; with those providing the essential services required to stay on the job, under the preexisting terms, without work interruption. A Division 8 project, or a project covered by a special project needs agreement, would be in an analogous position to those essential service providers.

This approach has the general support of CLAC and the Alliance. In each case, they have existing Provincial agreements that cover important matters such as hiring hall rules, health, welfare, training, pension arrangements and so on. Under the pre-1988 Division 8 such matters were picked up into site agreements. This would restore that past practice, but working the other way around, with the necessary changes incorporated into existing agreements.

The advantage of this approach is that it would leave undisturbed all existing bargaining agencies, resolving the "Charter - freedom of association" issues. Division 8 should include a specific statutory no-strike no-lockout provision involving work by employees engaged in the construction industry working on a Division 8 project. Validating Special Projects Needs Agreements, both generally and under Registration may well render this Division 8 process unnecessary, however it should remain efficiently available when voluntary direct bargaining proves inadequate. Mega-projects are not static. The recommendations above contemplate amendments to necessary common terms, if necessary, as well as extensions.

The possibility exists that an employer, engaged only in work on a Division 8 project, becomes certified. Similarly, an employer might, during the course of a project, become certified to a different trade union. If the trade union is covered by a Registration agreement no issue arises, as they would be bound by either a SPNA or an addendum for the project. If not, the new trade union might give notice to terminate the collective agreement. In either event, to the extent all or part of the bargaining unit is performing work on a Division 8 project, the terms, insofar as it affects those employees, should be subject to arbitration; either totally, or in so far as interim terms, including the common site terms, are necessary pending the result of bargaining for the balance of the unit. This should be accomplished by deeming the parties to have agreed to submit their dispute to voluntary interest arbitration under section 93, in so far as the dispute affects work on the designated project.

Chapter 11 Registration Related Issues

Industry participants have been asked, since the outset of this review - Should Registration in its present form, continue? Its purpose and effect is for the unions and employers involved to forego competition over terms and conditions of employment in favour of common end dates, common terms, and a unified province-wide bargaining cycle.

There is a widespread consensus that Registration should continue to operate and to be available. There were no substantial proposals for change, and no change, beyond the statutory endorsement of special project agreements, and the changes discussed later in this chapter, is recommended.

It is worth pausing to recognize Registration's success and its present benefits. From the 1960's through to 1987 the industry experienced a significant amount of lost time due to strikes and lockouts, both lawful and unlawful. The changes to Registration reduced that to virtually zero, an achievement no other Province can match. At least some of the Province's ability to continue to attract capital for major industrial projects is due to the stability thus created.

In 1988 the building trade unions, while initially skeptical about the new complex and coordinated bargaining structure, were asked to collaborate in making it work. They did so, and it worked. Similarly, concerns were raised about the inefficiencies and potential for disruption created by inter-craft jurisdictional disputes. Solutions were developed within the industry and they have reduced that problem substantially, with almost all complaints, on this score, rooted in historical anecdote rather than current experience.

Like much of the 1988 *Code*, it was written when the vast majority of unionized construction was performed by the building trade unions and employers covered by Registration. Since all the existing Registrations have been in place for 25 years, not surprisingly there is little debate about the registration or revocation of registration processes themselves.

Since then there has been an unquestionable shift in the market share of the building trade unions and the contractors covered by Registration. However, too often reference to that shift significantly downplays the market share these parties still retain and the very significant amount of construction work that is still performed under these agreements. Opinions differ on what the future will hold for that component of the

industry under Registration. One factor is the average age of construction union members working out of the hiring halls. Retirements, given present trends, may affect them disproportionately. Recommendations have already been made giving attention to the Province's ongoing need for a strong flow of apprentices and ongoing industry based training.

Those under Registration have been challenged to, and have accepted the challenge, of bringing underrepresented groups, including First Nations and women. Those under Registration have been challenged to do more to attract people into the trades and they have responded with initiatives like the Tradewinds Program directed at candidates in high school.

Registration agreements are subjected to criticism as less productive and more expensive than agreements reached outside Registration. Some of that criticism may be, or may have been in the past, justified, and the market has extracted its price when that has been true and it will continue to do so. However, some of those criticisms are marketing techniques in action.

One part of the competitiveness argument is the ability of employers not bound by Registration to save the costs of much of the training, and the health and welfare and pension contributions that form part of the craft union employees' pay package. Yet these payments have broad social as well as individual employee benefits. If ongoing training is needed for the Alberta economy; then the building trade unions' investment in such training needs to be recognized as a public as well as a private good. If retiring construction workers are self-sufficient due to a career involving pensionable employment that too is a public good. It is true that workers are often less long sighted than they might be; more attracted to "money in the jeans" than the longer-term benefits of employment. But that is not necessarily a positive in terms of social policy.

Contractors under Registration are not immutably tied to the system. If it ceases to work to their advantage, they are free to apply for revocation. They have not done so, and the widespread support for continuing the system in its present form suggests they are unlikely to do so in the near term. Centralized regulated bargaining still offers considerable advantage. Subject to what is said below, so does access not only to the resources of the local union but access through them to the resources of their affiliates throughout North America. They are able to do this using the travel card system which allows benefits like pensions, health, and insurance benefits earned in Alberta to apply within each employee's home local.

In short, Registration remains a significant part of the industry that almost all participants appear to support and want to maintain.

The parties to Registration bargaining have faced many challenges. Generally, they have succeeded, despite their differences, to work out consensual solutions. The fact that the large majority of submissions made during this process, through the Alliance, involved labour-management consensus is highly significant. Some simply attribute this to the competitive pressures the participants to Registration jointly face. But even if that were a fair observation, it is significant that labour and management were successful in doing so consensually rather than in an adversarial way.

Registration is not and has never been restricted to any particular trade union. If, for example, a sufficient number of employers who bargain with CLAC, or with Unifor, wished, they could apply to appoint a Registered Employers Organization to act for them, in the same way as the existing REO's operate when bargaining with the building trades. They have shown no inclination to do so, but the right exists. What the present law does require is that Registration reflect the division of the industry into four sectors, and that it corresponds with the way unions represent employees; that is, currently, by craft. This is one reason why the proposal to move from an exclusively craft-based bargaining unit policy to one allowing for all-employee units is significant to the Registration system, not just the certification process⁹⁹.

In short, Registration has served the industry and its participants well for a long time and is worth preserving, not only for those who use it now, but as a potential tool for others in the future should the level of conflict in the non-building trade alternative union area increase.

The Coalition particularly speaks of the decline in Registration's market share. Clearly in some areas of the industry this has been dramatic. However, some caution needs to be exercised before concluding from this that the parties to Registration are inherently less competitive or less productive than their alternative union or merit shop competitors.

The very significant issues over Division 8 and the CNRL project certainly altered the respective market shares to the detriment of the contractors and unions covered by Registration. Whether that was a strategic success by Merit and the progressive contractors, an owner's choice, or due to building trades intransigence will remain a matter of debate.

The certification processes discussed in a prior chapter have also had an influence. The *Code's* design is that those unions bound into the Registration system, if they wish, must

⁹⁹ This is addressed in the next chapter. Any change to an all-employee construction unit should be accompanied by a suitable change to the Regulation setting out available options for Registration.

attract majority support amongst the employees of contractors outside the system. Their ability to do so depends on the realistic availability of certification. To the extent “raid proofing” has gone on and it clearly has to a significant degree, this too has distorted market share.

A third influence on market share, addressed next, are efforts to employ building trade labour but outside of the scope of Registration.

The Scope of Registration – s. 176 & 178

Sections 176 and 178 form the centerpiece of Registration. They define on whose behalf a Registered Employers’ Organization is exclusively entitled to bargain, and with respect to which employers and unions the resulting collective agreement will apply.

Effect of registration

176(1) On the issuance of a registration certificate, the employers’ organization named in it becomes a registered employers’ organization and has exclusive authority to bargain collectively with the group of trade unions named in the registration certificate on behalf of

- (a) all employers actually or customarily engaged in the part of the construction industry set out in the registration certificate with whom any of the trade unions in the group of trade unions has established, or subsequently establishes, the right of collective bargaining, and
- (b) any other employer actually or customarily engaged in the construction industry who is party to an agreement, notwithstanding anything in that agreement, that provides that the employer shall comply with any of the terms of a collective agreement entered into by any of the trade unions in the group of trade unions in respect of work in the part of the construction industry set out in the registration certificate, but only while that agreement to comply remains in force.

(2) Subsection (1) applies to employers only to the extent of their collective bargaining obligations with a trade union.

Collective agreement between employers' organization and trade union

178 When a registered employers' organization and a group of trade unions enter into a collective agreement, the collective agreement is binding on

- (a) the employers referred to in section 176,
- (b) the employees of the employers referred to in clause (a),
- (c) the registered employers' organization insofar as the terms and conditions of the collective agreement apply to it, and
- (d) the group of trade unions and each trade union within the group.

The exclusivity Section 176(1) gives to an REO to bargain with the "Group of Trade Unions" named in the Registration certificate works, for employers, in the same way that certification gives a union bargaining rights for all employees in the unit. Registration binds the majority that chose Registration and the minority that did not (again, the majoritarian principle). Subsections 176(1) (a) and (b) define just which employers fall within this employer equivalent to the bargaining unit. Both sections are restricted to employers who are actually or customarily "engaged in the construction industry"¹⁰⁰.

176(1) (a) covers employers who are certified by or have given voluntary recognition¹⁰¹ to one of the unions in the Group. Voluntary recognition allows and requires a union and employer to bargain together much like certification, except that the Employer can terminate the recognition by giving 6 months' notice.

176(1) (b) includes within the scope of Registration employers who have not been certified or have not given full voluntary recognition to the union or unions. There are a variety of such agreements. One, as described in the Dubinsky report, involves employers who have an agreement with the Union's International body that says that, when operating within the territory or scope of the local union's charter, it will abide by the terms of the local agreement. Another was the agreement, historically at least required by owners, that any general or subcontractor must agree to work in accordance with the terms of the various Building Trade Agreements (affiliation agreements). Such agreements were generally limited to the project in question, hence the words "but only while that agreement to comply remains in force". Such agreements are infrequently used today.

¹⁰⁰ The term is explained in Chapter 5.

¹⁰¹ The notice, once given, triggers a union's right to apply to certify, or expand its certification to cover the voluntarily recognized group. See s. 42-44.

Registration was initially based on each separate local's territorial jurisdiction set out in its charter. The 1988 *Code* required Province-wide bargaining, and this gave rise to the "Group of Trade Unions" concept. Subsection 2 makes it clear that employers certified to one trade union in the group did not, as a result of Registration, become certified to the other local unions in the group, each of which had different territorial jurisdiction (for example, Southern Alberta vs. Northern Alberta).

In any majoritarian system, where the majority binds the minority based on the choice of the group, the integrity of the process is important. If some take the benefits while avoiding the burdens, in ways that put others within the system at a competitive disadvantage, the system loses both credibility and effectiveness. The rules involved should be clear, well understood, and enforceable. This proved not to be the case in the dispute involving the Ironworkers and Driver Iron Inc.

The Driver Iron Dispute

At about the same time of the CNRL issues described above, Ironworkers Local 720 signed two agreements; one with Horizon for the Division 8 CNRL project, and one with Driver Iron for the supply of Ironworkers to the Jack Pine Project. The agreement with CNRL was part of the Division 8 issues already addressed. The Jack Pine Project agreement was different in that it was not covered by Division 8. It challenged the common understanding of sections 176-178 that a Union, bound by Registration, could not bargain with an employer except through the REO and not without that Employer becoming bound by the Registration agreement.

The agreement in question was between Driver Iron Inc., a corporation affiliated with the J.V. Driver group of companies, and Local 720 of the Ironworkers. The CLRa Ironworkers trade division had no part in its negotiation and were not signatories. What Driver Iron Inc. later maintained it was entitled to do, without involving the REO, is described in the Labour Relations Board decision issued on January 8, 2009. That decision resulted from a complaint filed a year before by the CLRa trade division against both Driver Iron Inc. and Ironworkers Local 720, alleging negotiations and agreements that violated the CLRa's status as exclusive bargaining agent. Driver and the Local argued that¹⁰²:

[35] ... the bargaining rights of an REO on behalf of section 176(1) (b) employers are limited, not only to the term of the agreement with the union, but also to those terms of the registered collective agreement the employer has agreed to pick up. Section 176(1) (b) employers may agree to pick up all or any of the terms of the registration collective

¹⁰² [2009] ALRBR 26 at para. 36-36

agreement. This, Driver Iron argues, is supported by the Board's earlier jurisprudence considering section 176 and if the Board's approach is going to change, it should not be retroactive.

[36] Driver Iron submits employers and unions are free to enter into arrangements that are not collective agreements. If both parties express their intention not to have their arrangement covered by collective bargaining legislation, the Board should respect that. ... Unions obtain their jurisdiction to enter into agreements on behalf of their members from their constitution and there are many associations that engage in collective bargaining outside of the scope of labour legislation. (*emphasis added*)

The Labour Relations Board rejected these arguments in a decision that emphasized the need to maintain the integrity of the *Code's* Registration system. Given its importance to the central themes of this review, and in particular competitiveness and labour supply, these conclusions are crucial. They accord with the general understanding of how Registration was designed to work and are supported by prior Board decisions. No parties, during this review, argued, given the Supreme Court's decision, that the Board's ruling was not an accurate description of the current law. That decision holds:

[53] Section 176(1) (b) is a "trigger" provision. It does not sanction or authorize employers to agree to be bound to some of the terms of the registration collective agreement – it sets out the consequences of doing so. The consequences of doing so are the registered employer's organization becomes the employer's exclusive bargaining agent and the collective agreement it negotiates binds the employer. It is incorrect to suggest section 176(1) (b) permits an employer to pick and choose which terms of the registration collective agreement it will be bound by. To the contrary, the effect of section 176(1)(b) and section 178, is to capture those agreements and standardize them with the terms of registration collective agreements so as to maintain an even playing field among the players in the registration system.

It commented specifically at paras. 54-55 on the need to maintain the integrity of Registration:

To permit trade unions named in the registration certificates to negotiate directly with such employers and maintain different terms and conditions than those bargained by the registered employers' organization runs contrary to the very purpose of a mandatory registration system. It is this Board's obligation to maintain the integrity of the registration system so as to avoid employers employing the same union workforce obtaining an unfair competitive advantage over their fellow contractors. As the Board noted in *Empire Iron Works* (*supra* at page 193), construction contractors are especially vulnerable to unfair competitive advantage and permitting any cracks in the system runs the risk of causing the entire system to crumble. If, as CLRA warned, new employers

come into the province at a time when there is a labour shortage and enter into agreements with trade unions signatory to registration collective agreements on terms and conditions perceived as more attractive to union members, those employers gain a competitive advantage over other contractors vying for the same workers. However, it is precisely this competitive wage rate system the legislature replaced with the mandatory registration system in Part 3 of the *Code*.

[55] The harm to the registration system of permitting some employers to enter into different agreements with trade unions named in registration certificates is illustrated by the facts of this case. The CLRA, on behalf of its member contractors in this part of the industry, negotiated with the Ironworkers Local 720 and attempted to obtain the most favourable terms for its members. Subsequently, the Ironworkers Local 720 entered into an agreement with Driver Iron on terms CLRA was unable to obtain in its negotiations. As a result of its more favourable agreement with the Ironworkers Local 720, Driver Iron secured work CLRA members could not. Those contractors might have liked to try to negotiate their own agreement with the Ironworkers Local 720 but are clearly prohibited from doing so. Those contractors understand they need to compete with other contractors that have relationships with other unions or that employ a non-union workforce but they did not expect to compete with other contractors employing workers supplied from the same union. Naturally, they would question the representation of CLRA and the benefits of participating in the registration system. They might seek alternate ways of competing with Driver Iron. (*emphasis added*)

The Board's decision recognized that employers can enter into time-limited or geographically-limited agreements, but not some form of partial agreement.

[59] So what is permitted, is a "show me" agreement in which the union and an employer agree the employer will recognize the union for a fixed period of time during which the union can show the employer the benefits of a union relationship without buying into a long term relationship. For that fixed period of time, the registered collective agreement the union is party to binds the employer.

Significantly, the Board also found Local 720's actions amounted to a violation of s. 151(c).

[68] In our view, it is a violation of section 151(c) of the Code for a trade union to bargain collectively directly with an employer captured by section 176.

151 No trade union and no person acting on behalf of a trade union shall

- (c) participate in or interfere with the formation or administration of an employers' organization;

This dispute left unsettled an important industry issue for a significant 6-year period. Contractors bound by Registration found themselves unable to obtain sufficient Ironworkers to handle their own work as planned, because the supply they presumed they could rely upon as they had in the past was being used by their competition outside of Registration. They felt squeezed out of the work at CNRL and they were similarly at a competitive disadvantage to those contractors (of whom Driver Iron was only one) who were picking up work on other projects as well, relying upon the labour supply they felt they had secured through Registration bargaining by their relationship with Ironworkers Local 720.

Most assumed that the Supreme Court of Canada's decision put the issue to rest. As part of this review, stakeholders were asked specifically if any amendments were necessary to clarify the sections after the Supreme Court's ruling, in light of "lack of clarity" comments by the Court of Appeal in relation to the Board's decision. The consensus was that the law was now clear and that any subsequent alterations might imply some change which, of itself, could be disruptive. Given that view no alteration on that account is recommended.

The Driver Iron Decision, Spin-Off Locals and International Unions

What became apparent during the later stages of this review is that while the *Driver Iron* decision settled what a trade union local can do, there is still a highly contentious issue remaining in terms of what can be done either by an International Union or a sister Local of that trade union.

The CLRa asserts that, despite the *Driver Iron* ruling, Ironworkers continue to work for Driver Iron and, it is further alleged, for several other employers who are not bound by Registration. This supply of Ironworker tradespersons, it is said, comes from sister locals across Canada and the U.S. CLRa asserts that this is doing indirectly what cannot be done directly.

... having had the SCC confirm the original LRB decision, the International Ironworkers have maintained the mischief by making arrangements to dispatch members of the Ironworkers to Driver Iron's construction operations through Local 805, a local which we understand is prohibited by its charter from participating in construction. Contractors affected by our registration collective agreements remain with an inadequate workforce while the International continues to favour Driver Iron with a steady supply.

It urges legislative change to:

... restore the integrity and stability of the registration bargaining regime for the benefit of the public, owners, Building Trades unions and our contractors [and] ensure that collective bargaining relationships between REOs and Building Trades unions are not disturbed, circumvented or undermined by interference by International unions and other locals through arrangements to engage in negotiations outside of registration but affecting construction, or through workforce delivery outside the hiring hall arrangements set out in our collective agreements.

The CLRa suggests amending the legislation.

... to prohibit collective bargaining that would otherwise be prohibited by the group of trade unions named in the registration certificate, and to prohibit arrangements to supply workers in the sector and trade jurisdiction affected by registration through the parent organization and/or affiliated locals, other than at the terms of the subject registration collective agreement.

It went on to make the point that:

As we have seen in *Driver Iron*, lengthy litigation is not an effective response. This needs to be clear, and the response to any such intrusion needs to be quick.

Driver Iron was invited to clarify whether, and under what arrangements, it was using Ironworkers supplied in some manner whether through a local or through the International. It declined, not wishing its competitors or opponents to know about its business affairs. Despite that reluctance, it is clear from the Labour Relations Board reports, other documentation, and from information as to what is happening in the field that such supply is in fact occurring, outside of Local 720 and outside of the Registration system.

In December 2011, the CLRa, on behalf of its two Ironworker trade divisions, filed an application against Local 720 alleging that the local was, despite the CLRa's bargaining agency, negotiating directly with Driver Iron for the supply of Ironworkers. The application made no mention of the International Union's role. Driver Iron replied on January 19, 2012 and:

- denied that it had a collective agreement or collective bargaining relationship with Local 720 on the Kearn Project or any project;

- stated that it only had a “Labour Supply Agreement” with the International and its affiliated local unions, including Local 720 covering British Columbia, Alberta and Manitoba;
- submitted that the Labour Supply Agreement was not a collective agreement and did not establish bargaining rights but rather it was a commercial agreement;
- attached a copy of the Labour Supply Agreement.

The CLRa took the position that this showed that Driver Iron Inc. had taken steps by which it had become bound by Registration, and that the International’s role was as part of a scheme to undermine the REO’s. The application ended up in a dispute about who had to provide what documents, or how much by way of particulars, before the application could proceed. In a decision dated June 27, 2012, the Board dismissed the complaints because, in its view, the CLRa failed to offer [sufficient] particulars or clarification of the facts or of the legal position it relied upon¹⁰³.

The Board decision refers to earlier certification files. J.V. Driver Inc. has a modular yard in Nisku. Ironworkers Local 805 applied to be certified in 2011 for non-construction employees of Driver Iron on that site. The Board officer found that Driver Iron Inc. was acting as a labour broker for J.V. Driver Inc. In her view (and this was only an officer’s report) the appropriate unit for the Ironworkers employed by Driver Iron Inc., some of whom (between 6 and 19 employees) were essentially “on loan to J.V. Driver”. What is significant is that she also reported the following facts as she saw them:

Driver Iron is in the business of supplying labour not manufacturing modules. The fabrication shop described in the unit applied for belongs to another employer and their employees are unionized by a different union. This is not a permanent shop of Driver Iron, nor does Driver Iron operate any fabrication shops. The subcontracted labour is temporarily supplied to JV; similar to how Driver Iron subcontracts labour (ironworkers) to its other three contracts.

I believe that Driver Iron is a labour broker and that a craft based unit would be appropriate for collective bargaining.

The applied for unit leaves out a large group of approximately 74 employees. Those 74 individuals are performing ironwork on the three other Driver Iron contracts (Imperial Oil/Kearl Lake, Suncor and ALPAC). The 74 Ironworkers are supplied labour and share a community of interest with the six in the applied for unit. As a result, I recommend

¹⁰³ CLRa and Driver Iron Inc., Board file GE-06271 [2012] Alta. LRBR 89

that the Board dismiss the application as the unit applied for is not appropriate for collective bargaining. (*emphasis added*)

The implication is that the Ironworkers Union supplied labour to Driver Iron for all those four contracts, but outside of Local 720. Hence the CLRa's allegation that it was going through Local 805 (a non-construction local) which is the local that initially brought the all-employee certification application.

It now appears that (a) the Ironworkers Union, probably the International and not Local 720, have placed about 200 Ironworkers who are working in construction for Driver Iron Inc. It also appears that similar arrangements have been put in place for several other non-union or alternative union employers.

On November 29, 2012, the Supreme Court of Canada issued its decision upholding the Board's ruling in *Driver Iron*. A month later, the Union's International Representative wrote to the Union membership explaining the Union's position. That letter said, in part:

In 2006, Local 720 was facing lost market share to CLAC and nonunionized contractors. An opportunity presented itself for the Local to sign a temporary deal with a new company that Driver set up to do our work using members of Local 720 and other members from across Canada. The agreement, specifically set up for the 3 billion dollar CNRL project located in Wood Buffalo, involved extended shift cycles and paid return flights to various parts of the country. In return for the paid flights, the Local would concede double time to time and one half for overtime hours.

This is significant, in part, because of the CLRa's allegation that, in conceding double time for CNRL, the Union was giving something to Driver Iron it would not give to the CLRa group of contractors. Had there been a duty to bargain in good faith within Division 8, this, in its view, would have been a clear violation of that duty. The letter continued, referring to the CLRa decision before the Board.

We had hoped that the fighting over Driver Iron would have come to an end with the Alberta Labour Board deciding last June to throw out the CLR's (contractor's association) second assault on our relationship with Driver Iron. Unfortunately, there are local officers, members and contractors who continue to attack our successes in winning over CLAC employers like JV Driver and Flint Energy Services.

Under Local 720's agreements, and then through the International's agreement with Driver Iron, members from across Alberta and Canada have worked more than 5 million man hours for Driver to date.

No one has ever been forced to work for Driver Iron and no one forced Local 720 to consent to the International defending Local 720's deal with Driver Iron at the Supreme Court.

We are proud of our relationship with Driver Iron and Flint Energy Services and don't regret, for one minute, our efforts to create work opportunities for our membership.

Where We Go From Here?

There is no current agreement between Driver Iron and Local 720, so the Supreme Court's decision has no direct effect on our relationship with that company.

Bottom line is that the Alberta Labour Relations Board says it's okay for our existing union contractors to own and operate CLAC companies; however, it is illegal for Local 720 to maintain any relationships with a CLAC contractors.

Definitely over years of conservative governments in the province of Alberta, a double standard has been created to benefit the contractors. It is also clear that this double standard impedes our ability to organize new employers or enhance work opportunities for our members.

Therefore, the International needed to seek alternative ways to continue to honour labour supply agreements with Driver Iron and other CLAC contractors to continue to maintain our market share and work opportunities for members of the International.

Despite the abundance of work opportunities for union Iron workers in Alberta, we are still seeing loss of our market share. Yes, it appears we have a large market share, however, let's not be blind to what's happening beyond our neighbourhood. (*emphasis added*)

Thus, the International sees its position justified because, unlike employers, it cannot "double-breast" and, because of the various restrictions on organizing, it cannot obtain certification.

The original Labour Board decision held that the Ironworkers original legal position was wrong. However, despite that ruling the parties stuck to the practice for some time. The CLRa contractors say, correctly under the law as now accepted, that they lost very significant market share as a result. Five million person-hours is clearly significant. Now they say the same arrangement has been continued, initially it appears through a sister Local 805, and then through the International. The International's position now is that the Supreme Court decision only affects Local 720 and "has no direct effect on our relationship with that company".

The basic facts on the ground appear clear enough from others involved in the industry. The Company has acquired, as employees, Ironworker tradespersons from other locals in Canada and the U.S., with the cooperation of the International, but without those persons being dispatched through or directly affiliated with Local 720. About 200 such employees are working on a Driver Iron contract on a project for Shell in Cold Lake. There is evidence that suggests the Ironworkers, through its International or some local other than Local 720 is similarly supplying Ironworkers to other contractors whose employees are certified to CLAC or are non-union.

The question here is whether, as the CLRa alleges, this is a practice that undermines Registration and whether, if so, it is appropriately resolved through legislative change.

Factually it appears that the arrangement that existed with Local 720, after it was declared inappropriate by the Board, was continued probably initially through the agency of Local 805, but ultimately through the International Union, purporting to act somehow in a commercial but not a labour relations capacity and on its own behalf, not on behalf of its one chartered local that has the relevant geographical and industrial jurisdiction.

When Local 720 was dispatching Ironworkers, these Ironworkers too came from other locals across Canada and the U.S. The essence of the practice appears to continue but the name of the allegedly “commercially contracting” party has changed. One of the things Local 720, like most other building trade unions, puts on the negotiating table for contractors, is its commitment to supply them with labour for its North American affiliates. The labour supply term is one the Board found triggered the Registration provisions. No doubt arguments can be advanced that a sister local is, or is not, acting as an agent of the local bound by Registration in such circumstances. No doubt much reference could be made to the difficult law governing trade union parent organizations and their chartered locals¹⁰⁴.

Many years ago, when Registration bargaining in Alberta was in some difficulty, efforts were made by the U.A. Local 496 to avoid Registration effect by using Regina Local 179, then in trusteeship, to organize workers in Alberta. The Board very quickly added Local 179 to the Registration Certificate and the Group of Trade Unions to prevent such indirect dealing. Here, the issue now appears to involve the International rather than a sister local. However, it illustrates the same potential to undermine the Registration provisions by allowing the parent to do without consequence what the local can only do with a consequence. There is much merit to the CLRa’s position that this should be dealt

¹⁰⁴ See, for example, the decision in *Decentje et al v. IBEW Local 424 et al* [1999] ALRB 267 at 287.

with by legislative amendment rather than allowing such practices to continue pending another round of litigation. The Board's earlier decision involving Local 720 found the Local's conduct to be an unfair labour practice. It also heard, but did not accept, the argument that such "labour supply agreements" were not collective agreements under Alberta law.

To allow such a practice to continue does undermine the intent of Registration. From 1974 forward, it has been recognized that International Unions should not be able to contract in respect to Registration separately from their chartered locals in this jurisdiction. To allow an International to do so, even purporting to act solely in its own right, deprives employers certified to its affiliated locals the contract benefits for which, through Registration bargaining, they have paid. It also provides their competitors with a labour supply, and perhaps also a price advantage, that those bound by Registration cannot obtain directly from the Local, due to the conduct of that Local's parent organization. If such indirect dealing is to be countenanced, as the Board held in *Driver Iron* decision, upheld by the Supreme Court of Canada, it "runs the risk of causing the entire system to crumble".

The CLRa proposes the following legislative remedy:

175(2.1) When a trade union is named in a registration certificate, the registration certificate applies to the parent organization and affiliated trade union locals of the parent organization of the trade union as if they were named in the registration certificate.

It is recommended that this amendment be adopted.

Effect of Certification under Registration

When a construction employer is certified and engaged in work for which it contracted prior to certification, it becomes bound, as of the date of certification, to the terms of the Registration Agreement. Should the Code relieve that employer from the consequences of certification and allow it to complete some or all of the project under the terms under which the bid was made?

The construction industry is competitive and much of the work within construction is awarded on the basis of tendering processes. Wage rates are one, but by no means the only, element that goes into a competitive bid. Certification outside of Registration leads to a period of free collective bargaining. Under Registration, an Employer is

immediately and automatically bound by the Registration agreement as a result of s. 178(a) of the *Code*. The Coalition argues that:

When a company has secured work under certain economic assumptions, a newly imposed collective agreement can place the company in economic jeopardy and place jobs at risk. Again, to account for this risk, the contractor can include a contingency in the cost that it offers to an owner. However, this simply increases the costs to the owner of developing a project.

To provide greater economic certainty to contractors, contractors that are newly certified with a building trade union and have not had an opportunity to influence the registration collective agreement should be able to complete all work successfully bid prior to the certification under the terms and conditions that existed prior to the certification coming into effect. In this way, the company would not face economic jeopardy as a result of the change and could adjust future bidding to reflect the new agreement terms.

Building trade unions advance several reasons for opposing such a concept. First, they say voluntary relief has been offered in deserving cases since the unions have no interest in an employer going out of business. Quite the contrary they argue, whenever they certify an employer it is to provide an ongoing source of work for their members, giving them no interest in causing economic jeopardy.

Some argue that contractors in any event know the prevailing wage rates, and if they bid below these rates they know they face the twin perils of being unable to obtain skilled labour and of attracting a certification application. Some argue that, given the prevalence of corporate arrangements aimed at “raid proofing” in the industry, this would simply be an invitation to structure one’s contractual affairs so that no employee advantage could ever be obtained through certification.

Despite an invitation to provide examples of any such situations, none were forthcoming. The certification statistics reviewed in Chapter 9 show that, with only a handful of building trade certifications in the past four years, this is not a pressing practical problem. The mischief that could be created by allowing a newly certified contractor to complete all their work in hand under their existing contracts is significant. It would invite corporate structures and contractual arrangements that could never be the subject of collective bargaining.

It would also eliminate all incentive employees would have to support certification because, despite being the approved avenue to achieve collective bargaining, the *status*

quo ante would prevail and make such bargaining pointless. It is recommended that no change be made in this area.

Major Transmission Line Construction

An issue raised, but not widely discussed, in this consultation relates to what is an important activity, but something of a backwater. That is whether the construction of large-scale high voltage transmission lines is a subset of general construction and falls within the bargaining authority of the Electrical Contractors Association, or whether, instead, it is or ought to be a form of specialty construction eligible for its own sector. Saskatchewan legislation treats this as a separate sector.

IBEW Local 424 alleges that this work has historically been performed under a single collective agreement entered into outside of Registration. The work involved is, it says, transient and moves throughout North America. It involves erecting steel, pulling wire, installing equipment and operating the heavy equipment necessary for these processes.

This is a significant issue, and such transmissions lines form an important part of Alberta's infrastructure. However, this is not an issue appropriately dealt with in this review. It is recommended that the issue be referred to the Labour Relations Board for inquiry and advice under s. 12(9) of the *Code*. If the Board, after hearing from affected parties, finds this is a suitable area to be declared part of the specialty construction sector, then the Lieutenant Governor in Council should consider amending the Regulation accordingly.¹⁰⁵

¹⁰⁵ The Regulation in question is the Construction Industry Labour Relations Regulation, specifically s. 1(c), which could be amended for this purpose should the Board recommend it as appropriate.

Chapter 12 The Maintenance Industry

Alberta has a very large inventory of industrial plants and it is growing fast. All these plants need maintaining. Maintenance work requires the same skills as construction, but those skills have to be delivered in a different way.

Plant maintenance, performed by construction tradespersons, falls into three main groups.

In-house maintenance: Plant owners' employ tradespersons as part of their regular workforce to perform trades work within the plant to keep it in day-to-day running order. These persons are considered part of the operational workforce and, if certified, it is as a part of the plant operators usually "all-employee workforce".

Contracted on-going maintenance services: Many plant owners contract with companies offering on-going maintenance services. These contractors, either by supplementing the regular in-house maintenance personnel, or instead of them, provide specialized industrial maintenance services.

Shutdown or turn-around maintenance: Industrial plants need to be shut down for major refits, repairs and upgrading. Such events are carefully planned so as to reduce lost production to a minimum. They involve an intense need for a large number of highly skilled tradespersons for a short period of time. There are also unanticipated shutdowns caused by fire or major process or plant failure giving rise to similar needs. The same specialized contractors provide such services.

The second and third type of maintenance services are provided in large part by several very large maintenance contractors. Many are signatory to agreements with the General Presidents' Maintenance Committee and draw their labour as and when needed from the building trades hiring halls. There are alternative unions and non-union contractors operating in this area, but less so than in construction.

Maintenance has, ever since the advent of Registration, been excluded from the definition of construction. Two proposals, now advanced, would alter this. One would include maintenance contractors within the reach of the special provisions of Division 8. The second would allow all-employee bargaining units for maintenance as well as for construction.

On-going maintenance requires a relatively steady supply of skilled labour. In contrast, shutdowns and turn-around maintenance, and maintenance work in response to emergencies requires a very large workforce marshaled quickly to work for as short a time as possible, normally only a few weeks. Some work on a plant, whether repair work or upgrading, can only be accomplished while the plant is out of production. Wherever possible such shutdowns have to be carefully planned for maximum efficiency and minimum delay.

As with construction, major maintenance projects are linear, with different trades being brought on-site in the appropriate order. Shutdowns also have to be coordinated between projects; they cannot all draw on the same workforce at the same time.

In almost all provinces, the labour statutes exclude maintenance from construction, recognizing that, while using the same trades and largely the same unions, a different labour relations dynamic needs to exist. The focus of construction bargaining has been provincial. The focus of maintenance bargaining has been national, mostly through the General Presidents' Maintenance Committee for Canada.

The GPMC delivers two maintenance agreements, the GPMA for on-going construction maintenance and the NMA for short duration, intermittent maintenance. These are multi-craft collective agreements with all the trades working together under the same terms and conditions although with craft-based rates. To succeed, these agreements have had to achieve two things; no strikes or lockouts that might delay production and a steady supply of skilled labour on an as-needed basis. The no-strike or lockout objective has been achieved for about 60 years by providing, in each agreement, that the rates for each trade will be picked up from the local registration or accreditation agreements in force. The labour supply has been obtained by the union drawing first on the resources of the local union where the project exists, and then, as necessary, from other locals first in Canada and then in the U.S. The ability of employees to move between jurisdictions on travel cards, and to maintain their health, welfare, and pension benefits when doing so, is important to the ability to provide sufficient labour when needed.

While there are other contractors involved in this work with bargaining relationships with CLAC or other alternative unions, or with no union representation, it remains a part of the industry where the GPMC group remains dominant.

One of the significant projections for labour supply over the next decade is the disproportionate increase in the number of persons needed for maintenance work when

compared to construction, moving from near equal demand now to more than 2/3 maintenance 1/3 construction demand by 2030¹⁰⁶. The issue is:

Should any processes under Division 8 for mega-project construction extend to all the maintenance work done on that project?

This issue has already been partially addressed in Chapter 10. The Coalition, in advancing this proposal, argues:

There should be no entitlement for parties to strike or lockout in respect to the negotiation of maintenance collective agreements when a project has received Division 8 designation if the maintenance terms are to apply within the designated area, until all construction is completed. The renewal of maintenance collective agreements, whether they are General Presidents' Agreements or otherwise, that are under negotiation during the period while construction work is ongoing and until the completion of construction work, should be resolved by arbitration in the event those negotiations reach an impasse.

CNRL and the Merit Shop Contractors support this proposal. The position of CNRL is that "the negotiation of maintenance collective agreements by unions and subcontractors at the same time as construction covered by Division 8 is ongoing should be controlled so that a maintenance strike cannot shutdown a project through picketing etc." The Merit Contractors Association urges that a maintenance strike should never be allowed to shut down the construction of a mega-project being built under Division 8. This should be prevented by prohibiting strikes and lockouts for (and presumably on) a Division 8 project or there should be a parallel process to Division 8 for maintenance work on such sites.

The Alliance urges that maintenance not be included in the Division 8 process in any way. They emphasize the 60 years of strike and lockout stability this industry has achieved. This is due to the agreements' picking up the terms of the Registration agreements, ensuring an ability to attract labour when needed. Including some maintenance work in Division 8, and having some different collective agreement terms negotiated under that process would destabilize this process and add no demonstrable value.

The GPMC urges that their agreements work in harmony with not only Registration agreements but any Division 8 agreements as well. There have been no disruptions in the delivery of maintenance services under the present arrangements and there is no need to alter those arrangements now.

¹⁰⁶ See: Heavy Industrial Construction and Maintenance Workforces. *Challenges in Alberta*, May 2011, Construction Owners Association of Alberta

CLAC opposes the inclusion of maintenance work under Division 8. In its view, maintenance work, unlike the construction prior to start-up, is ongoing. In its view, any maintenance strike, even if involving maintenance work for completed parts of the project, will only incidentally affect construction itself. It notes that is not unusual for a workforce to have to continue working while a group of employees, working nearby or alongside of them, are on strike. This experience is not limited to Division 8 projects. The PCA took no position on the issue.

The Alberta Road Builders and Heavy Construction Association submits that it is not advisable to lump maintenance work into Division 8 provisions because of the different circumstances involved in each.

Many of the factors that justify the special provisions for Division 8 apply with less force to ongoing maintenance work on a plant during its construction phase. Unlike construction, maintenance is not discretionary. Maintenance work will continue throughout, even after construction is over, and there is no end date. No one has pointed to any work disruptions involving GPMC maintenance projects or otherwise, whether on newly built or operating projects.

Despite a call for any objective evidence to justify a change from the existing practice and any evidence of a problem to be solved, nothing whatsoever was brought forward. There is the potential that some separate negotiations for maintenance work for a Division 8 project would cause strain within the existing system if it set up terms and conditions for maintenance on that site that were either significantly lower than, or higher than, maintenance work elsewhere. In times of labour shortages, all industrial plants, particularly during shutdowns, are vulnerable to delays if workers are attracted elsewhere by higher rates.

The position advanced by CLAC is valid. All sorts of employees work in and around a Division 8 project. A strike or lockout involving other workers, despite creating some potential for unrest, need not and usually does not shutdown the construction work itself. In any event, the dispute-free record of the industry and its vested interest in maintaining that record suggests no change is justified.

Recommendation: That maintenance work not be included in any Division 8 provision.

Should the Labour Relations Board policy of certifying only craft units in the maintenance industry be changed to allow for all-employee units?

This too is a Coalition proposal, advanced in the following terms:

We believe that both maintenance units and construction units should be governed by a policy that allows for all-employee certifications. There is no conceptual distinction between construction and maintenance bargaining units. The same benefits from all-employee bargaining units arise in both types of work. The same evolution in how work is performed continues in both industries, though we acknowledge the evolution has occurred more quickly in respect to construction compared to maintenance. The same bargaining unit principles should apply to both, and it would be a mistake to treat them differently. Maintenance employees should be entitled to select all-employee representation.

Ledcor and CLAC express support for this proposal but without elaboration. However, many of the same arguments advanced from construction units, as discussed in the next chapter, can theoretically be applied to maintenance work as well. Those arguments are not however, supported by evidence of existing problems. All the Building Trades Unions making submissions supported, with some vigor, the submissions of the Alliance, the building trades collectively, and the GPMC. They all say this is the part of the industry with the greatest stability and the best track record; "if it ain't broken don't fit it" was the common theme.

Unlike the submissions on construction bargaining units, no party brought forward objective evidence to suggest that employers are having any difficulties in the maintenance area due to the current bargaining unit policy. No examples were provided of industry practices in maintenance that involved any significant breakdown in the use of craft workers along the relatively traditional craft lines.

Recommendation: That the Labour Relations Board maintain its current policy in respect to craft-based certification in the maintenance industry.

Chapter 13 Construction Bargaining Units

Certification is the customary gateway to the right to bargain collectively. The *Labour Relations Code* allows a trade union to apply for certification for “a unit that the trade union considers appropriate for collective bargaining” (see s. 32). The Labour Relations Board must satisfy itself, after any investigation that it considers necessary, that:

s. 34(1) ...

- (c) the unit applied for, or a unit reasonably similar to it, is an appropriate unit for collective bargaining,

Section 35(1) adds certain ancillary powers to this end. The Board also has the ability to establish policies for particular situations and has done so for the construction industry.

“An appropriate unit for collective bargaining”

The *Code*’s use of the words “an appropriate unit” implies that there may be more than one such unit. The words “appropriate for collective bargaining” do not simply mean, “can be bargained that way”. The term has been in use for 60 years and has always reflected more than just the mechanics of the collective bargaining process itself. To be “appropriate for collective bargaining” the proposed unit must reflect a workable labour relations balance between utility for the employer and the freedom of employees to bargain with those like-situated persons with whom they share a community of interest.

The leading text in Canada, Adams, *Canadian Labour Law* (2nd Edition), summarizes the “community of interest” concept this way¹⁰⁷:

“Community of interest” is a concept employed by all labour boards... In this way, the tribunals seek to describe bargaining units that neither include employees having a substantial conflict of interest nor omit employees sharing a large measure of economic interest. It is through the concept of community of interest that a labour board determines whether employees with craft skills and training should be separated from semi-skilled or unskilled employees where an applicant seeks an “industrial” or comprehensive unit. Similar factors prevail in determining whether production and maintenance employees should be grouped in a single unit with office, technical or clerical employees. Community of interest is also a concept relied on in determining whether there should be a grouping of employees employed at all of an employer’s

¹⁰⁷ p. 7.60

plants or locations. In making these determinations, labour boards are driven to consider a host of factors ...

The British Columbia Industrial Relations Council described the “appropriate bargaining unit” as follows¹⁰⁸:

The “appropriate bargaining unit” concept has no meaning in the abstract. It is a concept borne of legislative schemes which create, then regulate, the rights and obligations of parties within collective bargaining structures and processes. It is a term of art which is specific to labour relations.

The objective in determining and defining an appropriate bargaining unit under the Act is to draw a rational line around a group of employees; a constituency, upon which the legislation then confers certain rights and obligations. The line is to be drawn in such a way that it will permit the purposes and objects of the entire statutory scheme to be achieved. This does not mean giving free reign to the choices of employees or satisfying the interests of any one party. The wishes of employees, the ultimate beneficiaries of the statutory scheme of collective bargaining, are of course central to the scheme and obviously important; however, there are other considerations that must be weighed in the balance along with employee wishes.

Determining the appropriateness of a bargaining unit can be easy, but as often, it is not. It can be a most difficult form of adjudication where there are few constant values and considerations to guide the Council. If the setting within which the determination is being made is stable and established collective bargaining structures have succeeded over time, the task is somewhat easier to perform. In other settings which are being newly developed or are rapidly changing, it can be like trying to draw a picture on the surface of a stream of water.

The Council must have regard for and balance the interests of the workers within the proposed unit; of the other employees, if any, working for the same employer; of the trade unions that will represent the workers; of the employers without whom the interests of the workers would mean nothing; and of the public. These interests seldom stand still to be examined and identified; they are amoebic from case to case and from time to time.¹⁰⁹

Present Labour Relations Board Policies

¹⁰⁸ *Cicuto and Sons Contractors Ltd. et al v. International Union of Operating Engineers* (1988) 1 CLRBR (2d) 63

¹⁰⁹ *Cicuto* (supra) at p. 89

Current Labour Relations Board policies are set out in detail in the Board's Information Bulletin #11 – Bargaining Units for the Building Trades¹¹⁰.

These policies were established based on consultation within the industry. The last policy review involved a detailed examination of the workplaces where construction trade persons were employed, not only in construction itself, but in plants, fabricating shops, module yards, repair shops and so on¹¹¹. The policy was developed after several years of uncertainty in the industry and immediately following the introduction of the 1988 *Labour Relations Code*. The *Code's* transitional provisions required the issuance of replacement certificates and the new policy was developed, in part, for that purpose. The 1990 review suggested:

Most construction employees who choose trade union representation choose the building trade union appropriate to their craft. There has been little organizing by industrial unions in this area. Unionized construction employees maintain strong allegiance to their craft unions. Partly this is due to the hiring halls, the health, welfare and pension benefits and social facilities these unions offer.

The training construction employees receive parallels the jurisdictional lines followed by the craft unions. This reinforces trade based allegiances and creates a strong community of interest amongst employees in the various crafts.

Registration bargaining under the *Labour Relations Code* also follows craft lines. Considering these facts, the Board sees no reason to depart from its long established policy of certifying construction employees on craft lines.

The Board's policy as it presently stands is reproduced as Appendix 1 to this Report. It is a detailed document. However, for the purposes of this issue the key statement is this:

The Board certifies construction employees on a trade-by-trade basis. This is because registration bargaining takes place this way. It is also because trade unions and many employers operate along craft lines. Employees within a craft share a community of interest. They share skills, working conditions, training and union benefit provisions.

The Board also certifies construction employees on a sector-by-sector basis. The regulations under the *Labour Relations Code* divide the construction industry into four sectors:

¹¹⁰ Appendix I

¹¹¹ That review "Bargaining Unit Policies for Construction and Construction Related Employment" is available on the LRB website at www.alrb.gov.ab.ca/dp-001.html. It is also published at [1997] Alta.L.R.B.R. DP-001.

It then lists the four sectors: General Pipeline, Roadbuilding and Heavy Construction and Specialty Construction.

Registration bargaining occurs separately within each sector. A sector is a portion of the construction industry defined by the type of construction activity performed. Therefore, sector-based certifications are appropriate for sector-based registration bargaining.

As even a brief review of the Bargaining Unit Policies Discussion Paper will show, there is no presumption in favour of craft-based units just because construction workers are involved. The review and the subsequent board policy document deals with a wide variety of circumstances where construction workers are routinely included in all-employee units. For example, the Board's bulletin provides a series of guidelines reading, in part:

Commercial Fabricating Shops, Service, Repair and Specialty Trade Contractors

These categories cover a wide variety of employers all employing tradespersons, as well as other employees. The Board looks to the bargaining unit which appropriately balances the representational wishes of the employees and the legitimate interests of the employer.

When describing trade-based bargaining units for the employers, the Board uses the term "non-construction" in the bargaining unit description to distinguish the work of the trades persons from those in construction and those working for maintenance contractors.

The following guidelines may assist the parties in describing an appropriate unit:

1. Where the employer's work force involves only employees affiliated with a particular craft, the Board would grant a craft non-construction unit. This situation would often arise for a subcontractor who did both construction work and service and repair work within the same trade.
2. Where the employer had an integrated work force where tradespersons from several crafts worked along-side production employees in a plant or manufacturing type situation, the Board would normally only grant an all employee unit for that employer.

The policy of craft-based units that apply to work in the construction industry was particularly influenced by the statutory scheme for Registration bargaining, and the dominance of the building trade unions and the REO represented contractors in the industry. It was also influenced by a preference for a clear and certain policy that would

allow certification applications to be dealt with efficiently under the, then new, representation vote requirements.

No one has suggested that the Board abandon the practice of certifying, in separate units, those employees in construction and those outside of construction. Similarly, despite the issue having been raised for discussion, no party suggests that the present practice of certifying by sector should be abandoned, so neither issue will be addressed further. Many of the arguments made over construction industry bargaining units also apply to maintenance units. Maintenance units and the maintenance industry were the subject of the previous chapter and will not be further dealt with here.

The controversial issue is:

Should the Code, whether by statutory amendment or by a change in current labour board policy, allow for bargaining units in construction on a basis other than the specific craft units that it currently allows? In particular, should it allow what is often referred to as a "wall-to-wall unit" consisting of all construction employees of the employer in a specific sector of the construction industry?

Despite the other various sectors; general, pipeline and road building, and the subdivision within the general sector between heavy industrial work and commercial and institutional work, the specific focus of most concern was the heavy industrial sector and the type of work described throughout much of this report so far. Notwithstanding this focus, any change has the potential to affect all sectors and all forms of contractor whether labour broker, trade focused subcontractor, or general contractor. That fact alone makes it difficult to recommend a change capable of universal and certain application for all construction bargaining units.

Our Neighbours

Proponents of allowing "wall-to-wall" units draw on the Saskatchewan and British Columbia experience to support that step. In 2010, Saskatchewan adopted legislation that addresses construction bargaining units. It has also recently passed a new law; the *Saskatchewan Employment Act*, which has yet to be proclaimed. The current legislation provides:

Purpose and construction of Act

4(1) Subject to subsections (2) and (3), the purpose of this Act is to permit a system of collective bargaining in the construction industry to be conducted by trade on a

province-wide basis between an employers' organization and a trade union with respect to a trade division.

(2) Nothing in this Act:

(a) precludes a trade union from seeking an order pursuant to clause 5(a), (b) or (c) of *The Trade Union Act* for an appropriate unit consisting of:

- (i) employees of an employer in more than one trade or craft; or
- (ii) all employees of an employer; or

(b) limits the right to obtain an order pursuant to clause 5(a), (b) or (c) of *The Trade Union Act* in the construction industry to those trade unions that are referred to in a determination made by the minister pursuant to section 9.

(3) In exercising its powers pursuant to clause 5(a) of *The Trade Union Act*, the board shall make no presumption that a craft unit is a more appropriate unit in the construction industry than any other form of appropriate unit.

(4) This Act does not apply to an employer and a trade union with respect to an order mentioned in clause 2(a) or (b).

(5) If, after the coming into force of this section, a unionized employer becomes subject to an order mentioned in clause 2(a) or (b) with respect to its employees, the employer is no longer governed by this Act.

The effect of s. 4(5) is to lift poly-craft or all-employee units out of the Province's multi-trade multi-employer construction bargaining provisions. The Saskatchewan Board has interpreted these relatively new provisions in one major case¹¹².

British Columbia provides for all-employee units in construction and has done so since the *Cicuto* case referred to above. The British Columbia experience particularly justifies close analysis. The B.C. Council, in deciding *Cicuto* in 1988 had this to say about cross-jurisdictional comparisons:

... several references were made ... to the approach that is taken in other Canadian jurisdictions relative to the appropriateness of all-employee units in the construction setting. We considered those references only to find that they were of little assistance. There are material differences in the statutory schemes across the jurisdictions ... Some jurisdictions provide specifically for bargaining schemes tailored to the construction industry, whereas the Act in British Columbia does not. In short, in our own analysis we

¹¹² *Communications, Energy and Paperworkers Union of Canada v. J.V.D. Mill Services Inc.*, 2011 CanLii 2589.

strove to maintain fidelity to the scheme of the Act, and within the limits of our authority we tailored the conclusions to fit the realities which currently exist in the construction industry in British Columbia.

There are still important contextual differences between B.C.'s and Alberta's legislation. The most significant is that Alberta has a functioning and mandatory Registration bargaining system for all building trade unions that binds all employers with bargaining relationships with those unions. B.C. has no similar significant functioning system. From the advent of Registration (accreditation) Alberta opted for a comprehensive and mandatory system while B.C.'s accreditation was always voluntary.¹¹³ Further, the B.C. bargaining scheme, for the ICI (Industrial Commercial and Institutional) sector provided for (presumptively at least) single-table bargaining between the CLRBC and a legislatively mandated Bargaining Council consisting of all the B.C. Building Trade Unions. Alberta, despite considering this Bargaining Council idea, opted instead in 1987-1988 for the current Registration bargaining provisions which allow single-trade bargaining, but coordination in respect to any right to strike or lockout, and the CIDRT process to resolve the last remaining disputes once a pattern is set.

The B.C. practice was also a little different from Alberta's in that, even before 1988, B.C. had certified both CLAC and IWA locals for all-employee units. The IWA units were limited to construction of lumber mills. Some similar construction has occurred in Alberta, but apparently under existing plant agreements.

The key passage from *Cicuto* relied upon to support this argument reads as follows¹¹⁴:

An "appropriate bargaining unit" is a dynamic notion and we reject any proposition that what was an appropriate unit in the past in the construction industry is necessarily still appropriate. Among the many forms of bargaining unit descriptions that have been drawn and redrawn, perhaps the most constant is the "all-employee" version. While we disagree with the proposition that it is the "perfect" unit, long experience has shown that it is the form which is the best vehicle through which to deliver the objectives of the Act. Anything less than a broad-based all-employee unit is a compromise which requires drawing much finer distinctions between competing interests.

...

Since craft units have served the parties well, why not leave them alone; even protect them from the intrusion of other unions? The answer in large part lies in the construction industry itself which has changed and is changing dramatically. We are entitled to take

¹¹³ For a while B.C.'s system allowed employees to agree to be bound and required permission to leave. That is no longer the case.

¹¹⁴ At Page 89. This follows on from the passage already quoted above.

notice of what anyone who is even tangentially associated with the industry knows: the construction industry in British Columbia has had to cope with a contraction of its markets; changes in methods and materials; savage competitive pressures; and the ascendancy of the non-union sector. With regard to the latter point, it is no secret that the non-union contractors are now a force which must be recognized in the industry. This is a reversal from the situation that pertained through the 1960s and 1970s when the vast majority of commercial, institutional, and industrial construction was controlled by the unionized sector.

Much of this might be said of Alberta, if not all now, at different times. The next passage however applies less in Alberta, because of the structure and the success of Registration bargaining:

The collective bargaining structures within the construction industry have to be subject to change in order to remain appropriate under the Act. Indeed, changes have occurred in the past with the elimination of old crafts and the consolidation of others. A particularly important change in structure was made in 1978 when a determination was made by the LRB that the appropriate unit collective bargaining structure in the mainstream of unionized construction was a council of trade unions for consolidated multi-trade bargaining. (See: *In The Matter of an Inquiry Regarding the Structure of Bargaining by Building Trade Unions with Construction Labour Relations Association*, BCLRB No. 6/78, [1978] 2 Can LRBR 203.) Another important development occurred this year with the deaccreditation of the construction employers organization giving birth to the potential for a return to at least some of the problems which brought about the imposition of the council of trade unions (see *Construction Labour Relations Association of British Columbia*, IRC No. C28/88, affirmed on reconsideration in IRC No. C127/88).

In short, at this juncture the construction industry is not a stable and well established setting in which to determine the appropriateness of bargaining units.

The B.C. Council continued:

At this point in time, there can be no doubt about the continuing appropriateness of the standardized craft unit descriptions and the importance of craft unions. We do, however, believe that changes in the bargaining structure are inevitable and the craft unions could benefit from a more flexible attitude about changes in their own structures and toward working together to meet new challenges to those structures.

This comment is in part, although not exclusively, directed at the aversion of individual B.C. Craft Unions to the multi-trade bargaining process and to the legislated Council through which they had to bargain.

The IRC then explained its endorsement of the all-employee unit concept as follows:

Craft units are appropriate but they are not the only appropriate structure. We are satisfied that all employee bargaining units can also be appropriate in the construction setting. While limited for sound labour relations reasons, the scope for such units is not as narrowly circumscribed as the Applicants have argued. To repeat, we view the spread of the industrial collective bargaining structure within the construction industry as an evolutionary process. It is hardly surprising given the hard times which befell this industry in recent years, with the attendant high unemployment within the ranks of the traditional craft workers, that the workers themselves would be driven to reconsider their own choices about bargaining agents and structures. We take notice of the fact that many craft union members have sought and obtained non-union employment, not as much as an alternative to craft union membership but more as an alternative to unemployment. This appears to have been merely the first step along the road of evolution in response to changing realities.

The next evolutionary step was the attraction for construction workers in being represented within an all employee unit. Perhaps as a measure of their dissatisfaction with having no representation on non-union projects, some former craft union members chose to opt for collective representation using a different model. It is understandable that an all employee unit might be viewed as offering some of the benefits of union representation but with the prospect of more continuity of employment through seniority rights and assignments of work across craft lines; employment characteristics which are foreign to the craft unit model.

The *Cicuto* analysis, and the cases that have followed it since, leaving aside differences due to Alberta's legislative and economic differences, provide strong support for the concept of allowing all-employee units as well as craft specific units in construction. However, the *Cicuto* decision imposed some important restraints on the use of "wall-to-wall" units, and was decided in the context of the B.C. Code's other provisions.

B.C.'s Code, then and now, has different open periods. Where an existing craft certification existed, to succeed in an all-employee application, the applicant union would have to show support in each existing craft unit and within the all-employee unit (see *Cicuto* p. 84). In assessing whether an all-employee unit is appropriate, the decision added the following points (plus some others) (at p. 94-100).

1. The use of standardized craft bargaining unit descriptions continues to be appropriate.

2. The freedom of choice of workers is not in itself determinative when assessing the appropriateness of a bargaining unit, whether the proposed unit is craft or all-employee in character.
5. Craft unions are not precluded from participation in the representation of construction workers by means of all-employee bargaining units.
6. The Council will consider the application of the build-up principle when assessing the appropriateness of all-employee units in construction.
7. When considering applications for certification from generic unions, the focus for the Council is on the appropriateness of a proposed bargaining unit; not on the appropriateness of the applicant union.
8. In relation to voluntary recognition arrangements involving employees in the construction setting, unions, generic or craft, should not assume that the Council will continue to sanction top-down organizing as has been done in the past.

On the last point the B.C. IRC said at p. 100:

The Council must be satisfied that proper and adequate processes are employed to ensure that the democratic rights of workers affected by voluntary recognition arrangements are preserved and protected. Nothing less will be acceptable.

A significant number of employers operate across Western Canada. To the extent they structure their employment practices on an industrial model, and operate in other provinces under "all-employee" bargaining relationships, that fact is an important consideration in assessing whether an all-employee unit might be appropriate in Alberta. However, that is but one of several factors. It is also significant to note that some of the same concerns raised in Alberta about raid proofing and similar efforts to avoid building trade certification also remain issues in these provinces.

Legislation or Board Decision Making

The *Code* gives the Board the responsibility for determining appropriate bargaining unit descriptions, something necessary in many cases due to the wide variety of workplace circumstances. The Board also has the authority to establish suitable bargaining unit policies, as it has done in several industries including construction and near construction.

Addressing bargaining units in legislation can create rigidity and inflexibility over time. Legislation, if adopted, can set bargaining unit policies, create (or direct against) certain presumptive units, subject to a discretion to vary, or simply leave such matters to ongoing Board discretion.

The Coalition's position is that this issue should be legislated, putting all-employee units in the construction industry on an equal footing with craft units. It views the question as an important policy matter over which the government ought to legislate. The Alliance argues that, since it is not possible to legislate for every eventuality, board responsibility should remain the norm.

It is recommended that some legislative assistance be added as described below. However, the subject of appropriate bargaining units for construction is no longer amenable to one or even two clear predetermined options. If change is to take place it should be measured and should respond to differences in the type of employer and perhaps in the applicant trade union. Board discretion should remain the norm, and policies be developed by the Board without legislative predetermination.

Can all-employee units and craft-based units co-exist?

Assume the Board were to allow both craft-based and all-employee units within the construction industry, how would they co-exist?¹¹⁵ The topic is easy to envision in terms of "greenfield organizing" where no certifications exist. Often however, one or more units may already exist. The next heading asks "one way or two"; that is can the employees of an employer switch from one form of representation to the other. Here the question is, can they go half way in some mix and match fashion? On this issue the parties' various views provide much diversity and little clarity.

A few examples illustrate the difficulty of the "best of both worlds" approach. Assume an employer is certified for one trade. Should it then be permissible for another union to apply for all the remaining trades, except that one trade? Assuming the answer were to be yes, could employees within that unit then apply to carve out other specific trades, and if not, why not? Alternatively, could a union apply for an all-employee unit and eliminate the existing single trade unit. To do so, would they be limited to applying within the open period that applied to that single trade unit? As the British Columbia experience shows, these are not easy problems to resolve.

The problem is not insufficient imagination to solve these issues, it is the surfeit of imagination of those who would use the hundreds of possible permutations and

¹¹⁵ This leaves aside for now the question of the circumstances as to when it might do so.

combinations to reduce each certification application to a litigation war. Without cataloguing the various suggestions for the intricate ways all this might theoretically be accommodated, it is best to reject it as an option from the outset. As a general proposition, a construction work force should be subject to certification either on an all-employee basis, or else on a craft-by-craft basis. Anything short of that, in Alberta's context, would generally be unworkable.

The election analogy is helpful in illustrating the difficulties. Sixteen neighbourhoods within one constituency, but with each neighbourhood having the option to opt out for any given election. Add to that the reality that those living in each neighbourhood regularly vary from few to many.

Arguments in favour of allowing all-employee units

The first argument in favour of an all-employee unit is, despite assertions that craft employees have a strong community of interest with persons within their own trade, that is no longer as persuasive as it used to be. The chapter on "Changes within the Industry" recognized that a significant number of employees are content to seek work without going through a craft union or hiring hall process. Many have taken work with employers who have been able to operate without craft agreements and this has been particularly so in the commercial and industrial sectors. Employers have operated in that way for an extended time, and note can be taken of the absence of organizing in favour of the building trades. While some of that can be attributed to barriers to organizing; statutory or otherwise, that is far from a complete explanation.

Influential on this score are the experiences of those employers operating successfully, in the long-term, in the commercial and institutional sector. This, more so than the more transient labour broker companies described elsewhere in this report.

Some of this evidence of a continued employee willingness to work in an environment without a craft union presence is due to the increased availability of alternatives to what the craft unions offer by way of opportunities for work and benefits. The difference in the quantum or quality of such benefits may, at times, persuade employees to change their allegiances, but they are not arguments in favour of legislating one particular bargaining unit configuration.

A second argument in favour of an all-employee unit, for some employers, is that it more closely reflects the way they have chosen to structure their way of doing business. It is important to distinguish between the way an employer has in fact structured its business and the way it may characterize its future intentions.

Some employers have, however, over an extended period of time, structured their businesses so as to maximize the way they use employees across what would otherwise be craft lines. There are safety and legislative limits to how far this can go, but there are certainly employers who have adopted that approach and have been commercially successful in so doing. Again, this is more prevalent and developed in the commercial and institutional world than it is currently in heavy industrial construction. The evidence of "more efficient" deployment of labour is clouded somewhat by the prevalence of labour broker arrangements in industrial construction and by the confidentiality contractors seek to protect over these arrangements.

Another factor in favour of the option of an all-employee bargaining unit is something that has been a theme of several of the recommendations made so far in this report and that is the importance of employee choice. Despite the many cultural and historical differences between industrial and craft unions, and in their ways of approaching labour relations, the choice between them is one employees can and should be free to make. It is no longer self-evident how construction employees will choose a style of union representation.

Many employees will still support craft-based representation. Others may adhere to industrial unions that give priority to canadian autonomy, or to seniority and just cause protections. Yet others may prefer a less adversarial approach. As long as these choices between trade unions are made free of employer domination and by processes free of undue employer influence, employee choice should be an important consideration.

Another factor in favour of an all-employee bargaining unit is the statutory rather than just the practical ability to bargain, and, if necessary, to conduct a strike or lockout on an all-employee basis. So long as the certificates are separate there are arguments that could, and no doubt would be made, about issues like the validity of strike or proposal votes and so on in the event of conflict. It was just such issues that broke up national bargaining in many industries because of separate provincial certifications¹¹⁶. There is some substance to the Coalition submissions that:

... it is difficult to understand how all-employee units would not be appropriate for collective bargaining when the Board has acknowledged that all-employee bargaining is possible in construction (see *Midwest General Contractors Ltd.*, [2000] Alta. L.R.B.R. 86). It is inconsistent to allow all-employee collective bargaining and all-employee collective agreements, but not all-employee bargaining unit certificates. To say that alternative union contractors ought not to have a problem with trade-by-trade certifications because

¹¹⁶ Examples can be found in the printing industry, in meatpacking and in steel.

they can negotiate wall-to-wall collective agreements does not change this inconsistency. We submit there is no justification for the inconsistency.

Arguments in favour of maintaining the present craft units only policy

The present system, subject to the recommendations above, has worked well. The onus of justifying change is upon those who advocate on its behalf.

The industry, despite trends towards employee multi-tasking is still, in essence, craft-based. These trade divisions are not just based on rules crafted by the International Unions, they are deeply embedded in the structure, culture and institutions of the Industry. The apprenticeship programs are reflective of craft lines, and trades certifications are granted on craft lines. Alberta still makes significant use of compulsory trades and even for those that are not, there are still rigorously defined craft distinctions. This creates communities of interest and allegiances that are still strong.

Even within CLAC collective agreements, wages are established on a craft-line basis. Surveys conducted by the Merit Contractors show that their members too pay wages and benefits based on craft skills.

Maintaining harmony between the Registration system and the bargaining unit structures that provide the framework for Registration bargaining is a high priority.

Many of Alberta's contractors are craft based as well, specializing in the services of one or more of the crafts. What may be a sound policy for a multi-trade general contractor may be far less appropriate for a specialty trade contractor. It may simply mean that a dominant trade swallows up the secondary trade in terms of representation. The argument in favour of a legislated all-employee option leaves less room for discretion than may be appropriate.

Smaller units that can, for bargaining, be voluntarily aggregated into larger units. There is a potential that this could lead to instability during difficult bargaining if the certified groupings were used to unwind previously accepted all-employee voluntary bargaining. However, that is speculative and not a problem that has been experienced so far by alternative unions certified by craft, but who bargain on a wall-to-wall basis.

The Alliance argues that what appears to be behind the request for broader-based all-employee units is a desire to insulate employers from organizing by building trade unions. This, it argues provides no foundation for legislative change and is wholly

inconsistent with the principles upon which the *Code* is based. It is simply another way to undermine Registration.

One Way or Two Way?

Should a policy be adopted accepting applications for either craft-based units or all-employee units in construction, what happens if, later on, the employees wish to change their union representation? Should there be processes available to allow a reversion to craft-based units after an all-employee unit is granted? The Coalition acknowledges

... the challenges with attempting to mix an industrial based organizing scheme in the construction industry with the Building trade union model. In many respects these two approaches are like oil and water. They don't mix.

Ultimately, what the Coalition falls back on are two general policies customarily followed by boards when deciding bargaining unit issues. The first is the customary aversion to fragmentation of an existing bargaining unit. The second and related policy is that of putting the onus on the applicant seeking change to justify that change with strong reasons for doing so. The net effect of such rules however, is to grant the all-employee unit favoured status that would begin a gradual accretion into that structure with no easy way for unions, particularly building trade unions, to reestablish craft-based bargaining.

The "avoid fragmentation" cases generally emanate from non-construction industrial bargaining units. It is true that some British Columbia cases make the same observation in respect to construction units. Chapter 5 addressed in some detail the differing histories of craft versus industrial unions. British Columbia, for historical and political reasons, has exhibited a preference for industrial over craft-based unions, and it is industrial unions, as well as non-Registration employers, that advocate the all-employee option.

In Alberta, it is at this point inappropriate to give one approach paramountcy over the other by way of a presumption in favour of larger industrial units. If a choice has to be made it should be informed by both employee wishes, freely expressed, and by the particulars of an Employer's actual working arrangements. Craft unions have played a very significant role in Alberta's economic development and have proved capable of changing with conditions within the industry. There should be no presumption, and the facts now do not justify any presumption, that they are inherently less productive than unions based on the industrial model. That issue can be settled within the marketplace, and should not be prejudged by legislation or legal presumptions.

Craft Union Representation

The *Labour Relations Code* does not, and has not since the 1960's, differentiated between unions in terms of their ability to represent employees. Steelworkers can apply to certify dairy workers and Carpenters can apply to certify bricklayers. From the perspective of the legislation, they need only be "a trade union" and have the necessary employee support.

Alberta's *Code* also allows poly-union certification.

Joint application by trade unions

36(1) Two or more trade unions that together claim to have been selected by at least 40% of the employees in a unit that the trade unions consider appropriate for collective bargaining may join in an application for certification as a bargaining agent.

(2) When 2 or more trade unions join in an application in accordance with subsection (1), this Division applies to the trade unions in respect of the joint application and to all matters arising from the joint application as if the application had been made by one trade union.

So far in Alberta, this has only been used in quite specialized situations; for example in the Quality Control Council, where several trades support one specialized part of the industry. Otherwise, building trades have stuck to their own crafts and not sought to certify construction units for other crafts. That discipline, however, is facilitated but not mandated by the Board's craft bargaining unit policy. A change to that policy, to allow all-employee units, may lead individual building trade unions, or combinations of those unions, to seek certification for all-employee units.

Any all-employee unit policy runs the risks inherent in the linear nature of when the various trades appear on a major project site. The issue would be exacerbated by poly-union applications brought at times when their particular crafts temporarily dominate a worksite.

The B.C. Board's policy, from *Cicuto*, is that craft unions are not precluded from participation in the representation of construction workers by means of all-employee bargaining units. The Coalition's position here is that:

...our legislation should allow groups of unions, councils, or single Building Trade Unions to apply for and obtain "all-employee" bargaining rights.

Ontario's bargaining unit policies create exceptions from the usual industrial model in favour of craft units represented by that particular craft's union, but not others. The B.C. situation has been turbulent on this point. Its decision in *Campbell Construction*¹¹⁷ - which in part involved a motion to reconsider the case in *Access Rigging*, limited which union could apply for the Carpenter's craft unit. It held that not only was such an application restricted to a Carpenter's union but also to a particular Carpenter's Union.

A full analysis of the B.C. developments since *Cicuto*, while instructive in many respects as to the development of the construction industry in that province and generally, is beyond the scope of this report. What can be said of the B.C. experience is that it has been rife with disputes, both legal and industrial. Unlike Registration bargaining, the centralized bargaining system broke down, with inter-union rivalries defeating the objectives set for the Bargaining Council of British Columbia Building Trades Unions.

The B.C. experience suggest considerable caution should be exercised before holding, by Board policy or by statute, that any craft union should be free to certify any other craft unit or to seek to certify multi-craft or all-employee units. While the Coalition's proposal in this regard appears magnanimous, in application it is fraught with practical difficulty and has the potential to pit craft unions one against the other. The difficulties lie in the relative size of the respective trades combined with their members' appearance dates on a job site. These issues are problematic enough in the situation of a general contractor with multiple trades; they multiply with more specialized contractors where the trade-to-trade ratios can be quite different. Should a larger union, for example the Operating Engineers, with an early presence, be able to certify an all-employee unit while there are few other trades on site, and then only in small numbers? Just which one of the larger trades might command a majority at any given time depends on the stage of the project. The smaller trades would be at a perpetual disadvantage. A Board policy that allowed the smaller trades to be caught up in certification applications by much larger trades ill equipped to represent their specialized interests, is a recipe for industrial strife.

The Influence of, and on, Registration

¹¹⁷ *Campbell Construction Ltd v. United Brotherhood of Carpenters and Joiners of America, Local No. 1598*, 2005 CanLII 40118 (BC LRB).

The 1988 policy was heavily influenced by the paramountcy of building trade unions and the market dominance of Registration collective agreements. That dominance is no longer there. However, as described above, Alberta's Registration scheme, unlike B.C.'s experiment, has worked well and produced stability. It has fared well by any test in comparison to Saskatchewan and to Ontario. It may yet prove to be a useful tool for employers with bargaining relationships beyond the building trades, but such future use is entirely speculative.

Currently, once an employer is certified by a building trade union, that employer is bound by Registration. But what should be the result if a building trade union is certified for something other than a craft-based construction unit; that is for an all-employee unit, or as one partner in a joint certification application under section 36? To allow that bargaining relationship to operate outside of Registration has the potential to seriously undermine the position of employers who are themselves bound by Registration bargaining.

The newly certified employer would be able to obtain the advantages of a bargaining relationship with a building trade union without being under the REO's umbrella or being bound by the terms that apply to that employer's competitors. This would lead to a situation not dissimilar to the *Driver Iron* situation described above. Even a few such certifications would deprive employers of the benefits of Registration.

Conclusions

There are no easy or clear answers to the bargaining unit question. There are certainly no recommendations that would command widespread support. There are compelling arguments that employees engaged in the construction industry should be able to choose to be represented by an industrial union on an all-employee basis. The craft-unit option should continue as one option. However, there are no insurmountable arguments for excluding the all-employee option in appropriate circumstances.

The choice for a bargaining unit for a particular employer should, except in exceptional cases, be either one or more craft units or else an all-employee unit. A policy that allows an all-employee unit less specified crafts, along with one or more craft units, would generally prove unworkable both in the field and at the bargaining table. If such a policy were adopted, it would at least need common contractual end dates.

This report has noted, with concern, the prevalence of what appears in many cases to be, and have been proven in some cases to be, raid-proofing schemes. More particularly, it has noted the continuation of some practices, despite prior unfair labour practice

rulings. Board decisions have limited some of these practices and recommendations have been made in respect to others. All this is with a view to restoring employee free choice and restraining undue employer influence.

Employers, however, have a strong interest in pursuing business models that allow them to structure work in what they view to be a more efficient manner. Whether they are able to actualize those efficiencies is for the market to judge. But that judgment should not be a result of practices contrary to the *Code's* rules, either temporarily pending the delays of litigation, or through unfair labour practices that support one union over another. It should be based on demonstrated performance within the same rules that govern the competition.

Assuming such problems are overcome, then the Board should allow all-employee units in some appropriate circumstances. In the past, only one type of bargaining unit was appropriate. Now, both craft units and all-employee units may be appropriate. It should not be presumed that such units are appropriate for all circumstances. As with quasi-construction units, the situation of employers is now sufficiently diverse that, for a while at least, determinations may have to be made on a case-by-case basis.

What may be appropriate for an employer with a multi-trade operation may not be for an employer in a specialty area with a couple of trades. What may be appropriate for an employer that manages its own workforce and has a track record of actually maintaining a workforce and using persons across the traditional craft lines may not be appropriate for a labour broker retained to supply craft employees as and when requisitioned. Particular attention should be paid to the interests of small trades that might be swept up in industrial-style units consisting of primarily one or two trades. The considerations would be similar to those brought to bear in respect to quasi-construction units of a similar mix.

The Board should establish a mechanism for allowing all the construction employees of an employer to express their choice between representation by a single trade union for the entire unit, or instead, representation on a craft-based model, by craft-based unions. The employee choice on the question would be solicited by ballot before or in conjunction with a certification application in suitable circumstances.

Where existing craft unions wish to organize an unorganized employer that organizing should continue to be by applications for certification processed as currently, on a craft-by-craft basis.

Where non-craft unions wish to organize an unorganized employer they should be able to do so, on either a craft-based or all-employee basis, but only once the bargaining unit

has built up to a reasonably representative size given the anticipated contracts to be undertaken.

To achieve this, legislation is recommended, providing:

- (1) Notwithstanding craft-based sectors for Registration bargaining, the Board may, where in its opinion it is appropriate to do so, grant an "all-employee of an employer employed in a sector of the construction industry" certificate.
- (2) The Board may, in considering whether to grant an all-employee construction certificate under (1) or whether to grant one or more craft-based construction certificates where an all-employee certificate exists, conduct a vote amongst all the employees of the employer in the sector engaged in construction, on the question of whether they wish to bargain collectively on an all-employee basis or on the basis of individual craft bargaining units.
- (3) Any vote under (2) may be conducted before or coincidentally with any representation vote.
- (4) The results of any vote under (2) are a factor the board may consider in deciding on the appropriate bargaining unit but are not, of themselves, decisive of the issue.

This recommendation leaves many issues to be resolved by future board decision-making and by the gradual development of suitable board policies. That inevitably means uncertainty. But certainty that results only in blanket but inappropriate decision making, or further support for employer "raid proofing", at the expense of employee free choice, is equally undesirable.

Chapter 14 Labour Relations Change

The construction industry is a big vital lucrative business that is, by its very nature, competitive. It provides well-paying jobs for many Albertans.

There have always been ideological differences within Alberta's labour relations community. These differences have become more pronounced over the last two decades, particularly those that challenge some of the basic majoritarian tenants of the existing system. Those seeking change have several tools at their disposal, all of which are in play, all the time, in the many segments in Alberta's construction industry and in Alberta's body politic.

The discussions in the past have centered mostly around the appropriate balance between labour and management. In construction, at least, that is no longer the case. Much of the debate now is between how the *Code* affects one group of contractors vis-à-vis another, and between different styles of union. Some of it is over whether unions should have a role at all and over the majoritarian underpinnings of the present system.

Despite Alberta's relative success in managing its construction labour relations, the grass will always look greener elsewhere. Despite complaints about an alleged lack of competitiveness, our existing system has allowed for the growth of building trades, alternative unions and non-union structures within an industry that builds and maintains some of the biggest industrial projects on the continent. Alberta's tradespersons are very well paid and for some time have experienced steady and often growing opportunity. The industry has attracted many workers to Alberta, both permanently and to take advantage of temporary opportunities.

The *Labour Code's* provisions should be as clear as possible and widely understood; its preamble speaks to that as an important value. Circumstances do change, and the *Code's* provisions need to be kept up to date. This poses the question - How best is this achieved? Too often over the last 15 years or so, change has been achieved by strategic litigation.

This is increasingly an industry where the various stakeholders have important but sometimes conflicting interests. Government needs to be on top of the way the industry is developing and be, and be seen to be, open to hearing all sides of a debate before implementing change. Ministers responsible for the labour portfolio, however described, have always needed to perform an "honest broker" role, fostering productive relations between labour and management. This role is more important today than ever,

given the various interests and high economic stakes involved. This “honest broker” function can too easily become lost in the Government’s own agenda as a major employer in its own right, and as a result of broader economic concerns. The “honest broker” role is analogous to the Attorney General’s role in maintaining an independent and effectively functioning judicial system. The labour relations system similarly operates within a framework, with neutral mediation to facilitate settlements and avoid issues that can be avoided, and a Labour Relations Board to resolve the issues that inevitably need resolution in any such system.

A distinction needs to be drawn between the role of the Labour Relations Board and the role of the responsible Minister and the Department. The Board is the appropriate forum to interpret what the *Code* means. However, it is not a substitute, and should not be put in the role of being a substitute, for multi-stakeholder dialogue about legislative change that might affect the industry.

The 1988 *Code* introduced two new provisions that the Review Committee hoped would lead to an improved labour relations environment. They are the Multi-Sector Advisory Councils under s. 6 and the Round-Table Conference provisions in s. 7. These could usefully be called into service to improve communications among the various participants in the construction industry today. Doing so would add a new level of transparency to the debates going on. It would improve the level of trust, currently low, that the various interests are being heard and considered equally when change is being considered. It would be preferable to have such processes operate on a standing and regular basis, rather than simply being summoned to consider particular proposals.

It has clearly become and will predictably continue to be, a fact of life that there will be ongoing lobbying for *Labour Code* change. This is not unique to Alberta, it has national and continent-wide roots. It comes from the left and from the right. What is important is that, in so complex an industry, a broad vision of the Province’s best interests be maintained.

A standing consultation process would go some distance to dispelling the perhaps unjustified feeling by some in the industry that some influences are more readily heard than others. It would perhaps also help to clarify the difference in role between the quasi-judicial Labour Relations Board and the responsible Minister.

The Coalition advanced the following proposal in 2011.

Effective Appointments to the Alberta Labour Relations Board: The practices and procedures to appoint Chairs, Vice-Chairs, and other members of the LRB do not facilitate balanced representation on the LRB. **Recommendation:** continued diligence is

required by the Minister of Employment and Immigration to ensure that the Labour Relations Board consists of members who will reflect the legislature's policy intentions.

A former chair, when seeking candidates for board membership, would routinely liaise with the leaders of labour and management and solicit suggestions. The approach used there was to ask for persons who could act as effective "ambassadors"; to bring to procedural debates the current industry issues and to keep their sector of the industry abreast of the Board's thinking on such issues. It was to encourage the nomination of persons with a reputation, within their own constituency, but also within the constituencies on the other side of the table, for fair-mindedness and an ability to adjudicate without an unduly partisan bent. Some people are suitable adjudicators; others are more suitable as advocates. It was to ask for persons who were not the primary spokespersons for an organization, because their full-time role as their organization's chief advocate could easily be seen to compromise the quasi-judicial role of a board member and dampen their effectiveness as a member of a collegial board. It was to ask for persons who were equipped personally and institutionally, to accept the restraints that must exist in any quasi-judicial decision-making body to ensure the deliberative secrecy and collegiality upon which sound decision-making depends. That process yielded well-qualified and well-respected board members.

The more recent "interview committee search" for "qualified applicants" has lost some of the nuances inherent in such an approach. Qualified does not equate to truly representative. Representation entails a diversity of views; all significant stakeholder groups ought to be considered important for the Board's overall make-up. Efforts to exclude one's competitors should be given no weight. However, the task is primarily adjudicative; it is the rights of the parties to the dispute, under a fair and informed reading of the *Code* as written that must prevail. It is not primarily an opportunity to assertively advance one's own organization's or one's side's objectives. Nor should it be seen, if it is to command general respect, as a body appointed to advance a partisan view said to "reflect the legislature's policy intentions". That, everybody recognizes, is "code language" for a politicized style of adjudication. Those intentions are expressed in the legislation, read as a whole, as part of a system of balanced labour relations.

Consensus has been sought throughout this review. To the extent it has emerged, it is indicated in the body of this report. Where it did not emerge, in accordance with my mandate for this review, I have made recommendations based on the input received and the exercise of my own experience, knowledge and judgment

I wish to publicly thank all those who provided submissions, information and insights during the process and to also acknowledge the cooperation and assistance provided by the staff of the Labour Relations Board and the Department of Human Services.

Andrew C. L. Sims, Q.C.

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Appendices

1. LRB Information Bulletin #11 – Bargaining Units for the Building Trades
2. LRB Information Bulletin #12 – Registration in the Construction Industry
3. Discussion Paper #1 – Division 8 Construction Agreements
4. Discussion paper #2 – Competitiveness Considerations
5. Discussion Paper #3 – Construction Bargaining Unit Policies
6. Discussion Paper #4 – Integrity of Registration and Miscellaneous Topics
7. Written Submissions Received

#11 BARGAINING UNITS FOR THE BUILDING TRADES

1. INTRODUCTION

This Bulletin describes the Board's bargaining unit policies that affect building trade employees and their employers. It was prepared after a report (*Bargaining Unit Policies for Construction and Construction Related Employment*) and the industry provided feedback. See: [1997] Alta.L.R.B.R. DP-001.

Unions should use this Bulletin as a guide when applying for certification. See: Bulletin 8.

2. CONSTRUCTION VERSUS NON-CONSTRUCTION WORK

Building trades employees, and their employers, do some work that fits the *Labour Relations Code's* definition of construction work. Section 1 of the *Labour Relations Code* defines "construction":

1(g) "construction" includes construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include

- (i) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or*
- (ii) maintenance work;*

See: *Transwest Dynaquip Ltd. et al v. IBEW* 424 [1994] Alta.L.R.B.R. 99; *Burnco Rock Products v. Teamsters* 362 [1993] Alta.L.R.B.R. 89; *OE 955 v. Lafarge Canada* [1992] Alta.L.R.B.R. 569; *Elevator Constructors 130 v. C&M Elevator Ltd. et al.* [1995] Alta.L.R.B.R. 301.

Part 3 of the *Labour Relations Code* sets up a unique system of registration bargaining for the construction industry. This system is described in Information Bulletin 12. Most of the industry bargains under registration.

It is the Board's policy to certify construction employees in separate bargaining units from non-construction employees. This is because a bargaining unit must be appropriate for collective bargaining. Registration bargaining follows a different course than non-construction bargaining. See: Bulletin 9.

The Board has adopted standard bargaining unit policies for construction employees based on craft lines. This is necessary because registration bargaining occurs on craft lines. Craft divisions also influence unionization and training in the construction industry.

Building trades employees, and their employers, do other work that falls outside the construction definition, even though it involves the same employee skills. The Board calls this category of work "non-construction work". This other work includes service, maintenance and repair. It also includes building trade work in plants, mines or manufacturing.

If asked to determine if the work is construction or not, the Board's considerations include:

- the business of the employer; *See: CLRa v. IUEC Locals 122 & 130 et al. [1997] Alta.L.R.B.R. 364.*
- the location where the work takes place (construction work tends to be performed on a site which is temporarily used for that purpose and which have another purpose once the work is completed);
- the practices in the industry;
- the prime function of the employees;
- the presence of other trades or other employees; and
- the result of the work.

3. **CONSTRUCTION INDUSTRY BARGAINING UNIT PRINCIPLES**

The Board certifies construction employees on a trade-by-trade basis. This is because registration bargaining takes place this way. It is also because trade unions and many employers operate along craft lines. Employees within a craft share a community of interest. They share skills, working conditions, training and union benefit provisions. *See: Building Trades Council v. TNL Industrial Contractors and Ledcor Industries et al. [1996] Alta.L.R.B.R. 497.*

The Board also certifies construction employees on a sector-by-sector basis. The regulations under the *Labour Relations Code* divide the construction industry into four sectors:

- **General Construction:** All construction work that is not included in one of the other sectors and includes industrial, commercial, institutional and residential work.
- **Pipeline Construction:** Construction of a system of connected lengths of pipe or joints, usually buried in the earth or laid underwater.
- **Roadbuilding and Heavy Construction:** Preparation and excavation of commercial and industrial sites, gravel pits and industrial projects and the construction of roads, approaches, railroads, curbs and gutters, and resurfacing and repairing roadways. *See: IUOE Local 955 v. Foundation Co. of Canada et al. [1990] Alta.L.R.B.R. 631.*
- **Specialty Construction:** Work which spans or services the other sectors such as non-destructive testing work and work in respect of crane rentals in the construction industry.

Registration bargaining occurs separately within each sector. A sector is a portion of the construction industry defined by the type of construction activity performed. Therefore, sector-based certifications are appropriate for sector-based registration bargaining. *See: Construction Industry Labour Relations Regulation; IUOE Local 955 v. Foundation Co. of Canada et al. [1990] Alta.L.R.B.R. 40.*

The Board bases its unit descriptions on job function. Job function means the work that the employees do, not necessarily what they are called. The Board looks to the primary job function that the person is performing around the date of application. Job qualifications are important because they help the Board decide what a person is doing. However, the Board does not grant certificates for "all qualified" tradespersons in a craft.

When determining which bargaining unit an employee may fall into, the Board considers:

- **The unit applied for:** What trade is involved?
- **The nature of the employer's business:** Usually and by particular contract?

- **The prime function of each employee:** What skills does the employee use? What tools? What materials? Does the employee do the work or assist? Percentage of time this work involves out of the total duties?

See: Bulletin 22; Brauns Construction Ltd. v. Construction & General Workers', Local Union No. 92 [1992] Alta.L.R.B.R. 10.

The Board uses generic terms to describe each unit. Section IV below lists the Board's standard units for each sector. The following principles apply to each unit:

- Each unit description also includes the foremen, apprentices and welders related to the trade.
- The Board does not differentiate between qualified and unqualified tradespersons.
- By foremen we mean all non-managerial persons working within the trade, whether called foremen, lead hands, working supervisors or some other name.
- All construction units apply to the trade union local's territorial jurisdiction unless the unit description contains some other limitation. This is true even though Registration Certificates are province wide in scope.
- Trade jurisdictions are not intended to overlap. In cases where jurisdictional disputes arise, the Board may determine, for applications under the Code, which jurisdiction covers particular work. *See: Section 12(3)(q), (r).*
- The Operating Engineers bargaining units include related heavy duty mechanics.
- Many trades are not listed for the Pipeline or Roadbuilding and Heavy Construction Sectors. If employees in such unlisted trades work in those sectors, the Board will also grant certification for such additional trades within those sectors.
- The Board considers it inappropriate to grant a joint application for a unit combining two or more of these standard trade units.
- For a list of trades currently subject to registration, see Information Bulletin 12.

4. STANDARD CONSTRUCTION BARGAINING UNITS

The Board considers the following construction industry units appropriate for collective bargaining:

General Construction Sector:

General Construction Boilermakers
 General Construction Camp Caterers
 General Construction Carpenters
 General Construction Cement Masons
 General Construction Drywall Tapers
 General Construction Electricians
 General Construction Floor Coverers
 General Construction Elevator Constructors
 General Construction Glassworkers
 General Construction Insulators
 General Construction Labourers
 General Construction Lathers and Interior Systems Mechanics
 General Construction Masonry Bricklayers
 General Construction Millwrights
 General Construction Operating Engineers
 General Construction Painters

General Construction Plasterers
General Construction Plumbers and Pipefitters
General Construction Refractory Bricklayers
General Construction Refrigeration Mechanics
General Construction Reinforcing Ironworkers
General Construction Roofers
General Construction Sheet Metal Workers
General Construction Sheeters, Cladders and Deckers
General Construction Sprinkler Fitters
General Construction Structural Ironworkers
General Construction Teamsters
General Construction Tilesetters

Pipeline Construction Sector:

Pipeline Construction Labourers
Pipeline Construction Operating Engineers
Pipeline Construction Teamsters
Pipeline Construction Pipefitters

Roadbuilding and Heavy Construction Sector:

Roadbuilding and Heavy Construction Labourers
Roadbuilding and Heavy Construction Teamsters
Roadbuilding and Heavy Construction Operating Engineers

Specialty Construction Sector:

Specialty Construction Crane Rental Employees
Specialty Construction Non-Destructive Testing Employees

5. NON-CONSTRUCTION BARGAINING UNITS

Tradespersons work in a variety of situations other than construction. Often the Board must choose between two competing interests - the employees' and the employer's. Trade or craft-based units allow tradespersons to bargain through their craft union. This can, however, create many units within one workplace. It can cause jurisdictional problems. It can also impose too much collective bargaining upon employers. The guidelines below set out the Board's views on how to strike a proper balance for certain types of employment. Traditionally, the Board identifies maintenance units along craft lines while non-construction units span all crafts.

Maintenance Contractors

Alberta industry relies on the services of maintenance contractors. These contractors supply labour and expertise to maintain and repair industrial plants. They may perform "long-term contract" ongoing maintenance work at a plant or major "turn-around" maintenance during a plant shutdown or both.

Most often, these employers have structured their operations to coincide with the various trade union hiring halls. That is, their activities rely on the traditional craft lines of the building trade unions. The Board's policy is to certify maintenance contractors on a craft-by-craft basis for maintenance work. The various eligible trades are the same as those used for the general construction industry.

This policy applies to those contractors who are, or do work similar to, those signing the Building Trades General Presidents' Agreement. Many other employers do maintenance type work but they are not covered by this policy. This policy only applies to those primarily engaged in the business of long-term or turn-around industrial plant maintenance.

For such employers, the Board considers units such as:

- All Maintenance Millwrights
- All Maintenance Plumbers and Pipefitters

as appropriate for collective bargaining.

For trade-based units of maintenance contractors the following principles apply to each unit:

- Each unit description also includes the foremen, apprentices and welders related to the trade.
- The Board does not differentiate between qualified and unqualified tradespersons. *See: Section 1(f).*
- By foremen we mean all non-managerial persons working within the trade, whether called foremen, lead hands, working supervisors or some other name.
- All maintenance units apply to the trade union local's territorial jurisdiction unless the unit description contains some other limitation.
- Trade jurisdictions are not intended to overlap. In cases where jurisdictional disputes arise, the Board may determine, for applications under the Code, which jurisdiction covers particular work.
- Operating Engineers bargaining units include related heavy duty mechanics.

Labour Brokers

The use of labour brokers varies widely. In assessing an application for certification, the Board examines the way in which the broker's clients usually requisition and deploy employees. It also looks to employee function. The Board does not necessarily follow the wide variety of employee titles used by these employers.

Usually, the Board will apply the same appropriateness considerations that would be used for the type of work the broker supplies the employees to perform. This can vary from construction trades units to all employee units. *See: Bulletin 9.*

Single Trade Subcontractors

Many employers who act as construction subcontractors often only employ employees from one or two trades. They frequently perform service and repair work, sometimes using the same employees for construction and non-construction work. For such contractors, one or more craft-based, non-construction units may be appropriate. Examples might be:

- Non-construction Elevator Mechanics
- Non-construction Painters

Fabricating Shops

In *UA 496 v. Stearns-Rogers Limited* [1982] Alta.L.R.B.R. 82-012, the Board described four types of fabricating shops:

1. An **on-site shop** set up by a construction contractor or subcontractor engaged in building the project to build modules for incorporation into the project.

2. A **shop set up off-site** by a construction contractor or subcontractor engaged in building the project to build modules for transportation to the site for incorporation into the project.
3. A **shop set up off-site** by an employer other than the construction contractor or subcontractors engaged in building the project to build modules for the owner, contractor or subcontractor, for transportation to the site for incorporation into the project.
4. A **permanent shop** that, as part of its business, manufactures modules for incorporation into construction projects. This shop usually has a number of customers, probably manufactures certain "catalogue items" and has a permanent location and work force. It may be producing construction modules for different projects at one time or in sequence.

The Board found that the first three types of shops are part of the construction industry and the Board's policies on construction bargaining units apply. The fourth type of shop is commonly called a "commercial fabrication shop" and is included in the non-construction bargaining units.

Commercial Fabricating Shops, Service, Repair and Specialty Trade Contractors

These categories cover a wide variety of employers all employing tradespersons, as well as other employees. The Board looks to the bargaining unit which appropriately balances the representational wishes of the employees and the legitimate interests of the employer.

When describing trade-based bargaining units for the employers, the Board uses the term "non-construction" in the bargaining unit description to distinguish the work of the trades persons from those in construction and those working for maintenance contractors.

The following guidelines may assist the parties in describing an appropriate unit:

1. Where the employer's work force involves only employees affiliated with a particular craft, the Board would grant a craft non-construction unit. This situation would often arise for a subcontractor who did both construction work and service and repair work within the same trade.
2. Where the employer had an integrated work force where tradespersons from several crafts worked along-side production employees in a plant or manufacturing type situation, the Board would normally only grant an all employee unit for that employer.
3. Where the employer operates a shop with employees from more than one craft, and possibly non-craft employees, the Board would consider applications for either:
 - an all employee unit except office and clerical, construction, security and quality control,
 - a craft unit excluding construction, or
 - an all employee unit except office and clerical, construction, security, quality control and a specified craft (a "wrap-around" or "tag-end" unit).

See: Sheet Metal Workers' International Association Local No. 8 v. L.A. Brayer Industries Ltd. et al. [1986] Alta.L.R.B.R. 484.
4. Where the employer has clerical employees the Board would always exclude them from a straight craft unit. The Board would normally exclude them from an all-employee or a "tag-end" unit, unless the Board was satisfied the clerical employees

wanted inclusion. This is to prevent their being swept in as a result of the superior numbers of the blue-collar employees

5. Where the employees work in a shop, the Board might limit the certificate to employees working "in or out of the shop". If the same employer was also a maintenance contractor, this would distinguish the shop, service and repair employees from those engaged in the maintenance contracting aspect of the business. Again, this refers to a maintenance contracting business, not all maintenance work, some of which falls into what we are calling service and repair work performed by persons working in or out of the shop.

Plants

The Board favours plant type units for manufacturing plants, petrochemical plants, tarsands plants, power plants, mines and similar undertakings. Normally, the unit would read:

All employees [at the plant] except office and clerical personnel.

This policy recognizes the normal grouping together of tradespersons and operating personnel in such production facilities. Usually, as a result of the tradespersons intermingling with the operation employees, they share a strong community of interest with the operations group.

The Board usually excludes office and clerical employees. Applicant unions can include them if they can show majority support within the office and clerical group. This is to avoid the capture of such staff into a unit by the (usually much larger) industrial work force.

Territorial Scope

Unlike construction or units for maintenance contractors, these non-construction units are not necessarily limited to the applicant trade union's territorial jurisdiction. The appropriate geographic scope of the unit depends on the nature of the employer's operations. Sometimes it will be appropriate to limit a unit's scope to a shop, a city, or a given region. All employee units apply to the employer's operations throughout the province unless the certificate specifies some limitation.

7. BARGAINING UNIT DESCRIPTIONS

Applicant unions should consider the points included in Information Bulletin 9 when drafting unit descriptions. *See: Bulletin 9.*

See also:

Information Bulletins 12 and 21

For further information or answers to any questions regarding this or any other Information Bulletin please contact:

Director of Settlement
Labour Relations Board
501, 10808 99 Avenue
Edmonton, Alberta T5K 0G5
Telephone: (780) 422-5926

Manager of Settlement
Labour Relations Board
308, 1212 31 Avenue NE
Calgary, Alberta T2E 7S8
Telephone: (403) 297-4334

#12 REGISTRATION IN THE CONSTRUCTION INDUSTRY

1. INTRODUCTION

The *Labour Relations Code* allows construction employers to form employers' organizations to bargain on their behalf with the construction trade unions. *See: Sections 166 to 179.*

An employers' organization can apply to the Labour Relations Board for a registration certificate. Registration gives the employers' organization authority to bargain collectively on behalf of the affected employers. Applicants must use a Board form when applying for registration.

This Bulletin describes the filing requirements and time limits for such applications. It also outlines the Board's policies and procedures for handling registration applications.

2. DEFINITION OF CONSTRUCTION

The *Labour Relations Code* defines construction in Section 1(g). This definition reads:

1(g) "construction" includes construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include

(i) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or

(ii) maintenance work;

3. PART OF THE CONSTRUCTION INDUSTRY

An employers' organization can apply for a registration certificate for a "part of the construction industry". There are four factors involved in a part of the industry. *See: Sections 166, 163(2)(b).*

Province-Wide Scope

Each part of the industry applied for must be province-wide. *See: Section 171(2).*

Sectors

The Code limits the part to a sector of the industry. A sector is a portion of the construction industry defined by the type of construction activity performed. The Lieutenant-Governor in Council establishes these sectors through regulations. There are currently four sectors:

- Pipeline Construction
- Roadbuilding and Heavy Construction
- General Construction

- **Specialty Construction**

See: Sections 163(2)(c), (3), 208(1); Construction Industry Labour Relations Regulation.

Trade Jurisdiction

A trade jurisdiction means a type of construction work, like plumbing or carpentry. Trade jurisdictions customarily reflect the types of categories used in the apprenticeship program. They also largely reflect the definitions used by the building trade unions to define which union has authority to represent which workers. *See: Sections 163(2)(d), 208(1); Construction Industry Labour Relations Regulation.*

Group of Trade Unions

While registrations are province-wide, trade unions are often regional. The *Labour Relations Code* allows more than one trade union to be grouped together for the purposes of one registration application or certificate. This group of trade unions will often consist of several locals of one building trade union. *See: Sections 163(2)(a), 172; Construction Industry Labour Relations Regulation.*

An example of how a registration certificate may read is,

"All employers in the province of Alberta engaged in plumbing and pipefitting work within the general construction sector of the construction industry."

4. THE APPLICATION

Timing of the Application

The Code sets out three circumstances that may impose time limits on employers' organizations applying for registration. These include filing of constitutional documents, existing collective bargaining relationships and seasonal factors.

a) Constitutional Filing

An employers' organization applying for registration must file its constitutional documents at least 60 days before it applies for registration. *See: Sections 164, 170(1).*

In special cases, the Board can reduce this period. However, the employers' organization must apply for this reduction before it applies for registration.

b) Existing Collective Bargaining Relationships

An employers' organization may apply for registration at any time except:

- when the majority of the employers affected by the application and the trade union or trade unions named in the application are bargaining collectively, or
- in the ten-month period preceding the end of the term of the collective agreement between the trade union(s) and the majority of employers affected by the application.

See: Section 170(2).

c) Seasonal Factors

An employers' organization should consider seasonal factors when applying to be a registered employers' organization. The Board may refuse an application if it considers the application untimely given how these factors affect the work related to the part of the construction industry. *See: Section 170(3).*

Form of the Application

An application for registration must include:

- the legal name, mailing address and telephone number of the applicant employers' organization,
- the name, mailing address and telephone number of the applicant's contact person,
- the full names, mailing addresses and telephone numbers of the trade unions the applicant seeks to have within the scope of the registration,
- a description of the part of the construction industry for which it seeks registration,
- a description of the trade jurisdiction applied for,
- evidence of 40% support of the employers engaged in that part of the industry it wishes to represent. These employers must have a bargaining relationship with one or more of the trade unions named in the application,
- the section of the Code relied upon, and
- a statement of the result desired (i.e., the granting of a registration certificate for part of the construction industry).
- a statement in the form prescribed by the Board confirming the application has been served on any parties known to be affected or subsequently added by the Board.

See: Rules of Procedure, Rules 5.1, 6.

6. PROCESSING OF THE APPLICATION

The Board processes the application according to the principles and procedures in Information Bulletin 2.

When the Board receives an application, the Director of Settlement may appoint an Officer to investigate. The Officer begins by reviewing the status of the employers' organization and the timeliness of the application. *See: Sections 16(4)(a), 13; Rules of Procedure, Rule 22(1)(g); Bulletins 2, 3.*

Employees may receive notice of the application by a Notice to Employers and Employees posted at the work sites. The Officer directs the employer or union or other person to post the notice. The notice tells employers and employees about the procedures and time limits for filing objections. *See: Section 13(1)(e); Rules of Procedure, Rule 14; Voting Rules, Rule 8(c).*

Trade Union(s) Response

The Officer seeks information from the trade union(s) named by the applicant for registration about:

- their legal name, local number, mailing address, and telephone number,
- a contact person and telephone number,
- which employers in the part of the industry for which registration is being sought the trade union has a collective bargaining relationship with, whether by certification or by voluntary recognition. *See: Section 169(3); Voting Rules, Rule 8(h).*

Individual Employer Response

The Officer seeks information from the employers who might be affected by the registration application, about:

- their legal name, mailing address, and telephone number,
- a contact person and telephone number,
- the trade union(s) with which the employer has a collective bargaining relationship, whether by certification or by voluntary recognition, and whether or not the employer operates in the part of the industry claimed by the applicant. *See: Voting Rules, Rule 8(h).*

The Officer's Report

The Officer, employers' organization and unions discuss which employers are in or out of the scope of the proposed registration certificate. They review the method and times suitable for voting should a vote be needed.

At the end of the investigation, the Officer completes a report and gives it to the parties. *See: Bulletin 3.*

The report includes:

- a recommendation about the status of the employers' organization,
- a summary of employer support,
- a list of employers in the part of the industry,
- a recommendation about the appropriate part of the construction industry for registration,
- a recommendation about the appropriateness of grouping the trade unions under one registration certificate for collective bargaining, and
- a recommendation on which employers are included or excluded from the part of the industry, if such a determination might affect the 40% support.

The Officer communicates the contents of the report by written notice to all the parties.

If not previously scheduled, the Director of Settlement may schedule a hearing.

Objections to the Report

An objecting party should communicate its objections to all parties, including the Board, before the hearing.

The Board requires that objections be clear, specific and detailed. General objections are not normally acceptable.

If the Board receives no objections, it processes the application relying on the Officer's report. It confirms the date of the representation vote if there is 40% support of employers.

On the hearing date, the Board hears any objections. The Board will normally rely upon the facts set out in the officer's report unless an objecting party introduces further evidence. *See: Rules of Procedure, Rule 26.*

The Hearing

At the hearing, the Board decides:

- if the applicant is an employers' organization under the Code,

- the appropriate part of the industry for collective bargaining purposes,
- which employers come within or are excluded from the part of the construction industry,
- if there is evidence of 40% support,
- the appropriate trade jurisdiction,
- the appropriateness of grouping the individual trade unions in the registration certificate, with regard to the province-wide nature of bargaining, trade union affiliation, and the ability of the trade unions to bargain and administer a collective agreement as a group.
- the date, place and times of the representation vote, and
- if there are any prohibitions to the registration under section 174.

See: Section 168.

If the Board is satisfied, after a hearing, that the applicant has 40% support of employers in the part of the industry applied for, it conducts a representation vote.

The Vote

The Officer gives the employers notice of the vote.

The Board has both Voting Rules and procedures for representation votes which apply to this process. *See: Voting Rules, Part II.*

The Returning Officer counts the vote and advises the Board.

If there are no disputed ballots, the Returning Officer directly advises the parties of the results.

The Board notifies all parties of the success or failure of the application.

The Registration Certificate

The Board issues the certificates to the employers' organization and trade unions. Each trade union and the employers' organization receive original copies. The Board retains a copy. *See: Section 175.*

The information on the certificate includes:

- the legal name of the employers' organization,
- the name of the trade union(s) with which the registered employers' organization may bargain collectively,
- the part of the industry, and
- the date of registration.

Sections 176 and 178 of the *Labour Relations Code* set out the effect of registration.

Section 176 of the Code reads:

176(1) On the issuance of a registration certificate the employers' organization named in it becomes a registered employers' organization and has exclusive authority to bargain collectively with the group of trade unions named in the registration certification on behalf of

- (a) all employers actually or customarily engaged in the part of

the construction industry set out in the registration certificate with whom any of the trade unions in the group of trade unions has established or subsequently establishes, the right of collective bargaining, and

(b) any other employer actually or customarily engaged in the part of the construction industry who is party to an agreement, notwithstanding anything in that agreement, that provides that the employer shall comply with any of the terms of a collective agreement entered into by any of the trade unions in the group of trade unions in respect of work in the part of the construction industry set out in the registration certificate, but only while that agreement to comply remains in force.

(2) Subsection (1) applies to employers only to the extent of their collective bargaining obligations with a trade union.

Section 178 reads:

178 When a registered employers' organization and a group of trade unions enter into a collective agreement, the collective agreement is binding on

- (a) the employers referred to in section 176,*
- (b) the employees of the employers referred to in clause (a),*
- (c) the registered employers' organization insofar as the terms and conditions of the collective agreement apply to it, and*
- (d) the group of trade unions and each trade union within the group*

These sections provide that a registered employers' organization has authority to bargain for affected employers. Affected employers are those who have a bargaining relationship with one or more of the trade unions grouped together for the purposes of the registration certificate. Any collective agreement between the registered employers' organization and the trade union binds the employer to the extent of its bargaining relationships with the trade unions concerned.



**CONSOLIDATION ORDER FOR 2013-2015 ROUND
OF CONSTRUCTION BARGAINING**

IN THE MATTER OF THE LABOUR RELATIONS CODE and the Consolidation Order, under Section 184 affecting the Registered Employers' Organizations and groups of Trade Unions affected by Registration Certificates

	Trade Jurisdiction	Registered Employers' Organization	Trade Unions Affected
1) All registrations in the Pipeline Construction Sector are consolidated.			
Cert. #1	Teamsters	Pipe Line Contractors Association of Canada	General Teamsters, Local 362
Cert. #2	Operating Engineers	Pipe Line Contractors Association of Canada	International Union of Operating Engineers, Local 955
Cert. #4	Plumbers	Pipe Line Contractors Association of Canada	United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488
Cert. #56	Labourers	Pipe Line Contractors Association of Canada	Construction and General Workers', Local 92 and Construction and Specialized Workers, Local 1111
2) The following registration in the Roadbuilding and Heavy Construction Sector is consolidated.			
Cert. #5	Operating Engineers	Alberta Roadbuilders & Heavy Construction Association	International Union of Operating Engineers, Local 955
3) The following registration in the Specialty Construction Sector is consolidated.			
Cert. #6	Non Destructive Testing Workers	NDT Management Association	International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 146; and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 and Local 496 Operating as the Quality Control Council of Canada

4) The following registration in the Specialty Construction Sector is consolidated.

Cert. #46	Crane Rental	Alberta Crane Owners' Association	International Union of Operating Engineers, Local 955
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5) The following registrations in the General Construction Sector are consolidated (Group 1).

Cert. #13	Sheeters, Cladders and Deckers	CLRa - Sheeters, Cladders and Deckers (Provincial) Trade Division	Sheet Metal Workers' International Association, Local 8
Cert. #24	Operating Engineers	CLRa - Operating Engineers (Provincial) Trade Division	International Union of Operating Engineers, Local 955
Cert. #25	Teamsters	Industrial Contractors' Association of Alberta	General Teamsters, Local 362
Cert. #43	Cement Masons	CLRa - Cement Masons (Provincial) Trade Division	Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local No. 222
Cert. #48	Structural - Ironworkers	CLRa - Ironworkers - Structural (Provincial) Trade Division	International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union No. 720 and International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 725
Cert. #57	Labourers	CLRa - Labourers (Provincial) Trade Division	Construction and General Workers', Local 92 and Construction and Specialized Workers, Local 1111

6) The following registrations in the General Construction Sector are consolidated (Group 2).

Cert. #18	Sheet Metal	CLRa - Sheet Metal (Provincial) Trade Division	Sheet Metal Workers' International Association, Local 8
Cert. #19	Sprinkler Fitters	Canadian Automatic Sprinkler Association	United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 496
Cert. #28	Refrigeration Mechanics	CLRa - Refrigeration (Provincial) Trade Division	United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488
Cert. #29	Elevator Constructors	CLRa - Elevator Constructors	International Union of Elevator

(Provincial) Trade Division

Constructors, Local 122 and International Union of Elevator Construction, Local 130

Cert. #47	Reinforcing - Ironworkers	CLRa - Ironworkers - Reinforcing (Provincial) Trade Division	International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 720 and International Association of Bridge, Structural and Ornamental Ironworkers, Local 725
Cert. #61	Bricklayers - Masonry	Masonry Contractors Association of Alberta	International Union of Bricklayers and Allied Craftworkers, Local Union No. 1, Alberta and International Union of Bricklayers and Allied Craftworkers, Local Union No. 2, Alberta

7) The following registrations in the General Construction Sector are consolidated (Group 3).

Cert. #55	Glass Workers	Glass Employers Association of Alberta	International Union of Painters and Allied Trades, Local 177
Cert. #58	Painters	Alberta Coating Contractors Association	International Union of Painters and Allied Trades, Local 177
Cert. #59	Roofers	CLRa - Roofers (Provincial) Trade Division	Construction and General Workers, Local 92; Sheet Metal Workers' International Association, Local 8; United Brotherhood of Carpenters and Joiners of America, Local Union No. 1325
Cert. #62	Tile Setters	Granite Marble Tile & Terrazzo Union Contractor's Association of Alberta	International Union of Bricklayers and Allied Craftworkers, Local Union No. 4, Alberta
Cert. #63	Insulators	CLRa - Insulators (Provincial) Trade Division	International Association of Heat and Frost Insulators and Allied Workers, Local 110
Cert. #64	Plasterers	CLRa - Plasterers (Provincial) Trade Division	Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local No. 222

8) The following registrations in the General Construction Sector are consolidated (Group 4).

Cert. #7	Boilermakers	Boilermaker Contractors Association of Alberta	International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 146
Cert. #27	Plumbers	CLRa - Mechanical (Provincial) Trade Division	United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 and United Association of Journeymen and Apprentices of the Plumbing and

Pipefitting Industry of the United States and Canada, Local 488 and
United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 496

Cert. #49	Millwrights	CLRa - Millwrights (Provincial) Trade Division	Millwrights, Machinery Erectors and Maintenance Union Local 1460 of the United Brotherhood of Carpenters and Joiners of America
Cert. #51	Carpenters	CLRa - Carpenters (Provincial) Trade Division	United Brotherhood of Carpenters and Joiners of America, Locals 1325 and 2103
Cert. #52	Electricians	Electrical Contractors Association of Alberta	Local Union 424, International Brotherhood of Electrical Workers
Cert. #60	Bricklayers - Refractory	CLRa - Bricklayers (Provincial) Trade Division	International Union of Bricklayers and Allied Craftworkers, Local Union No. 1, Alberta and International Union of Bricklayers and Allied Craftworkers, Local Union No. 2, Alberta

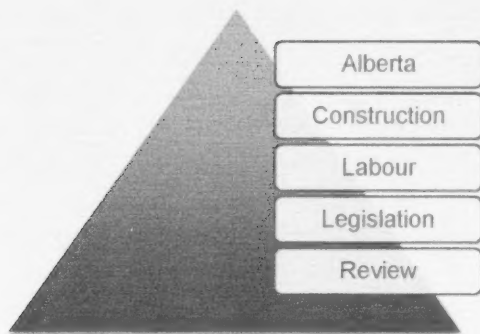
See also:

Information Bulletins 1, 3, 4, 7, 13 and 14
Rules of Procedure
Voting Rules

For further information or answers to any questions regarding this or any other Information Bulletin please contact:

Director of Settlement
Labour Relations Board
501, 10808 99 Avenue
Edmonton, Alberta T5K 0G5
Telephone: (780) 422-5926

Manager of Settlement
Labour Relations Board
308, 1212 31 Avenue NE
Calgary, Alberta T2E 7S8
Telephone: (403) 297-4334



Discussion Paper #1

Division 8 Construction Agreements

This is the first in a series of focused requests for input on specific topics. It focuses on the current provisions in Division 8 of Part 3 of the Labour Relations Code for Major Construction Project Agreements. Division 8 is appended for ease of reference.

Some have suggested changes are necessary to this part of the Code; some to the procedures for approval, others to its scope or to its substantive provisions. Others feel that, since projects have been undertaken under a Division 8 authorization, change is not warranted and might be destabilizing. The Building Trade – REO agreements now contain more sophisticated contractual provisions for special projects than existed before.

What follows is solely to generate comment and debate. It is not meant to imply that any change is appropriate or should be recommended, or if it may be, what those changes should be. Some specific questions are posed for comment at the end of this paper.

Current Provisions

The current Division 8 provisions were introduced in 1988. They replaced earlier Oil

Sands Project Carve-out provisions. They allow a project proponent to apply for authorization to have a principal contractor negotiate a major project agreement. If authority is granted and once a project agreement is negotiated, that collective agreement lasts until the end of the project.

The current provisions can apply to the construction, alteration or addition to a plant for the production or manufacture of petroleum, natural gas and pulp and paper. It can include any related camp or catering facilities. Other products may be added by Regulation but so far none have been.

The provisions are in the Part of the Code dealing with the construction industry (see s.163(1)) which, under the current definition (see s 1(1)) does not include maintenance work.

The current provisions contemplate voluntary bargaining with employers and trade unions that wish to work on the proposed project. They contain no provision for mandatory arbitration. They contain nothing like the CIDRT (*Construction Industry Dispute Resolution Tribunal*) process that applies under Registration. There are no provisions for dealing with any impasse between a principal contractor and a trade union.

An Exception to Registration

In 1988, when Division 8 was written, heavy industrial work on major projects was almost universally done by employees who were members of the various building trades unions.

Most of these unions and employers were bound by Registration bargaining and agreements. Without Division 8, direct bargaining for a voluntary major project agreement would offend the exclusive bargaining rights of the Registered Employers Organizations whose agreements bound those same employers.

No Strikes – No Lockouts

Division 8 prohibits strikes and lockouts with respect to the negotiation of an authorized major project agreement (see s. 197(6)).

Any such agreement, once negotiated, continues in force until its expiry, the completion of the project, or the repeal of the Regulation authorizing the agreement, whichever comes first. No strike or lockout is allowed during that same period (see s. 199(3)).

Rather than resorting to the Division 8 provisions, most major projects up until 2004 were accommodated by special project agreements between the various building trade unions, the REO's who bargain for employers, and the project's owners and principal contractors. These agreements, while they involved some special project terms, were essentially "pick-up" agreements. The parties agreed to forgo any participation in province wide registration strikes or lockouts, but also agreed to pick-up, for the project, such terms that were negotiated.

The CNRL – Horizon Authorization

In 2004, CNRL applied to the Minister of Labour for authorization for Horizon Construction Management Ltd. to negotiate a major project agreement for phases 1, 2 and 3 of the CNRL Horizon project. After considering the application and taking it to Cabinet, Order in Council 565/2004 was passed on December 6th, 2004. It authorized Horizon to bargain collectively for all construction work in all three phases of the project.

The Horizon proposal anticipated, for the first time, that the workforce would involve both affiliated and alternative unions on the same site.

Court Challenge – Procedures

Early in 2005, a coalition of building trade unions launched Court challenges to both the Minister's method of handling the CNRL Horizon application for project designation and the Cabinet's decision to pass the

approving Order in Council. This challenge raised procedural objections to the way the Minister and Cabinet considered the request. It alleged a failure to give sufficient notice and an opportunity for input to the unions as affected parties.

Court Challenge – Charter Issues

Also in 2005, a coalition of building trade unions launched an additional challenge to the authorization on *Charter of Rights and Freedoms* grounds. Since that time, the Supreme Court of Canada has issued further decisions concerning the Charter issues raised at the time.

After these challenges were launched, the various affected parties met and eventually arrived at a project agreement under which the construction proceeded. Some point to this as a successful conclusion, others as indicative of a remaining need for clarification or change.

What is a Major Project?

As a result of the challenges advanced in 2005, and the inherent vagueness of the term "significant to the economy of Alberta", some suggest that a clearer definition of a qualifying project ought to be developed, and some system or rule devised to identify, in some fair but expeditious way, what projects qualify.

One possibility is to set, by regulation or revised legislation, the criteria needed to achieve "major project" status; perhaps expressed in terms of total estimated capital cost, total anticipated person hours, or some similar test.

Mandatory Arbitration?

Some advance the idea that the negotiation of a multi-trade major project agreement could be handled in an analogous way to registration bargaining. That is, the authorized principal contractor would initially negotiate with trade unions indicating a willingness to enter into an agreement to work on the project. Once a certain number

of trade agreements are reached, the balance of those agreements would be settled through a mandatory arbitration process. Arbitration, it is suggested, would be appropriate once the majority of trade agreements were in place.

Others suggest that this would be unworkable where the unions representing the various trades include both alternative and building trades affiliated unions. Their benefit plans, terms of employment, and wage arrangements are too different.

Some note that unaffiliated unions are already free to negotiate long-term project agreements because they are not bound by Registration. Division 8 is only necessary at all because of the need to create an exception to the exclusive bargaining rights held by REO's. The Horizon experience, which eventually included building-trade affiliated unions, suggests to some that existing mechanisms are sufficient to meet the objectives Division 8 was designed to achieve.

If some mandatory process for settling collective agreement terms were to be considered, it would need to be accompanied by rules governing how and when unions and employers could become involved in the process, and when and how that involvement might end. It might be by unilateral withdrawal (with or without time frames), by some LRB supervised transitional process, or some other mechanism.

Wage Rate Issues

Major projects are important to Alberta's economy. They depend on large-scale long-term investment.

The justification usually put forward for Division 8 is to offer owners and investors longer term predictability than ordinary collective agreements allow, whether under Registration or not. It provides some assurance against labour unrest during the period of construction. Building a project normally takes longer than the customary two-year term agreements.

Cost certainty is advanced as another advantage. However, wage rates in the construction industry are not always predictable over the longer term, and predictions may prove too high or too low. The same is true of other terms and conditions. The challenge, in any longer term agreement, is to ensure that the contracted for provisions do not, themselves, fall out of step with the market. Without that, projects can experience labour unrest, an inability to adjust costs, or an inability to recruit a sufficient workforce.

This is particularly important if Alberta is indeed facing a shortfall in available trained construction workers. In the past, "pick-up" agreements partially addressed that issue by tying project rates and conditions to the broader Province wide registration agreements. Non-union or alternative union workforces might have had to meet such terms in times of labour shortage, although perhaps less so in times of over supply.

Maintenance Contracts

Construction workers not only build major projects, they also maintain them. While some owners undertake routine maintenance on their own behalf, many contract for that work with specialized maintenance contractors. Such contractors, in addition to doing routine maintenance, undertake the work required for major routine or emergency shutdowns.

As the number of major plants operating in the Province grows, the labour supply necessary for maintaining these projects increases. When a plant is down for scheduled major maintenance, or due to an emergency, there is great pressure on employees and contractors to get the work accomplished in the minimum possible time, subject to safety considerations.

Some have suggested that a strike or lockout by maintenance employees has as much potential to be economically damaging to the Province's reputation and to investor confidence as a disruption during construction.

As a result, some advocate including maintenance work in any revised major

project agreement provisions. In what way this might be feasible given the several different employers involved and the entirely different and often intermittent timeframe for the work is not clear and needs further clarification if it is to be considered.

General Presidents' Agreements

Specialized maintenance contractors have largely handled major plant maintenance work. Mostly, they have agreements with the various building trade unions negotiated, with local participation, as part of the General Presidents' Agreement process.

Such agreements, while they contain special provisions for the maintenance industry, have also often picked up the rates and other terms and conditions from the various Registration Agreements. That technique, many argue, has been what has prevented any significant degree of labour disruption or lost person hours in maintenance due to (legal or illegal) strike activity.

Certification Issues

A future paper in this series will address the issue of construction industry bargaining units.

Some parties seek changes to the existing Labour Relations Board policy of aligning construction industry bargaining units to trade jurisdiction and the current structure of Registered Employers Organizations as set out in the Regulation. Some unions seek, and the building trades unions generally oppose, the granting of "all employee" or "wall-to-wall" construction units.

Any such change might arguably impact on provisions governing major project bargaining. Some suggest there is ambiguity in the existing Code in respect to how pending major project agreement negotiations affect a trade union's right to apply for certification for employees that might be covered by any pending project agreement.

Constructing Major Projects

Some question whether the notion of a single or blanket long-term major construction project collective agreement is any longer a desirable goal at all. Owners, some suggest, have modified business practices to the point where that are now reluctant to "put all their eggs in one basket".

Rather, work is parsed out in more "bite sized portions", and in a way that allows for competition between contractors, and an ability to switch principal or sub-contractors more freely. Some see the growth in alternative unions as a symptom of that more profound trend, and based on owner choice not labour legislation.

If this is so, does it suggest that major project labour relations provisions should be less focused on one long-term agreement? If not, are other mechanisms needed for major projects in the future?

Submissions Invited

Submissions are invited on Division 8 generally as well as on any of the specific questions that follow.

Submissions may be shared and will be used as the basis for further consultation amongst construction industry participants. A high priority during this consultation is to seek out areas where a broad consensus in favour of change might be possible.

Send submissions to:

Andrew C. L. Sims, Q.C.

Chair – Consultation Process
149 – 10403 – 122 Street,
Edmonton, Alberta,
T5N 4C1

Telephone: 780-423-6807

Fax: 780-423-6813

e-mail: andysims@simsgroup.com

There are no specific deadlines, but early responses would be appreciated. There is no particular format required, although submissions, in whole or in part, may be

circulated as part of the consultation process.

Some Specific Questions

❖ *Does Division 8 need revision or is it sufficient, in its current form, for its purpose?*

❖ *Are changes desirable to:*

- *The method of processing applications*
- *Make sure it is Charter compliant and not liable to future challenge*
- *Alter or define which projects qualify under Division 8*

❖ *Should the legislation provide for any mandatory arbitration or CIDRT like processes to resolve impasses, and if so, in what circumstances?*

❖ *Should the maintenance industry in any way be incorporated into the provisions in Division 8, and if so, in what way, by what mechanisms, and with what objectives?*

❖ *Are changes needed to clarify how a Division 8 application, or authorization, affects recognition, certification or decertification processes under the Labour Relations Code?*

Definition of Construction

Definitions

1 In this Act,

(g) “construction” includes construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include

(i) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or

(ii) maintenance work;

Division 8

Collective Agreements Relating to Major Construction Projects

Interpretation

194(1) In this Division,

(a) “plant” means a plant or other works or undertakings for the production or manufacture of petroleum products, natural gas products, pulp and paper products or any other products specified in the regulations;

(b) “principal contractor” means the person, corporation, partnership or group of persons primarily responsible for the construction of a plant or the alteration of or addition to an existing plant, and may include an owner of the plant or a person contracting with the owner for the construction, alteration or addition;

(c) “project” means the construction of a plant or the alteration of or addition to an existing plant, and includes providing camp or

catering facilities in connection with that construction, alteration or addition.

(2) The Lieutenant Governor in Council may make regulations specifying products for the purposes of subsection (1)(a).

Application for authorization

195(1) A person who wishes to engage in a major project may apply to the Minister for an authorization allowing a principal contractor to bargain collectively with respect to the project.

(2) An application under subsection (1) shall be in the form and contain the information prescribed by the Minister.

(3) If the Minister considers that the project is significant to the economy of Alberta, the Minister shall forward the application to the Lieutenant Governor in Council.

Designation of project

196(1) If the Lieutenant Governor in Council is satisfied that it is in the public interest that a person or a designated principal contractor be authorized to bargain collectively as a principal contractor of a project in respect of which the Minister has received an application under section 195, the Lieutenant Governor in Council may by regulation designate the project as a project to which this Division applies, and authorize the principal contractor to bargain collectively in respect of that project.

(2) In a regulation made under subsection (1) or in any subsequent regulation, the Lieutenant Governor in Council may also

- (a) designate the principal contractor,
- (b) prescribe the scope of construction to which a collective agreement under this Division shall apply, and

(c) provide for the method by which it shall be determined when the completion of the project occurs for the purposes of section 199.

(3) A designation granted in favour of an owner of a project or a principal contractor may, with the consent of the Minister, be delegated to another principal contractor or another owner or from one principal contractor of the project to another principal contractor of the project.

Collective bargaining by principal contractor and trade unions

197(1) Subject to subsection (2) and the regulations under section 196, a principal contractor designated under section 196 may engage in voluntary collective bargaining on the principal contractor's own behalf and on behalf of any other employer engaged in the project with any trade union that is a bargaining agent of the employees of the principal contractor or of the employees of those employers referred to in this subsection.

(2) A principal contractor and a trade union referred to in subsection (1) may bargain collectively with respect to any terms or conditions of employment of the employees referred to in that subsection.

(3) When a collective agreement is in effect between

(a) the principal contractor in the principal contractor's capacity as an employer or any other employer referred to in subsection (1), and

(b) a trade union,

the collective agreement and the rights of the parties to that collective agreement are unaffected by any collective bargaining between a principal contractor and a trade union pursuant to this section.

(4) This section applies notwithstanding that

(a) a registration certificate is in effect with respect to

(i) the principal contractor in the principal contractor's capacity as an employer or any other employer on whose behalf a principal contractor is authorized to bargain collectively under this section, and

(ii) a trade union,

or

(b) a collective agreement is in force between

(i) the principal contractor in the principal contractor's capacity as an employer or any other employer on whose behalf a principal contractor is authorized to bargain collectively under this section or any employers' organization, and

(ii) a trade union.

(5) Sections 59 to 83 and 163 to 193 do not apply to a principal contractor and a trade union in respect of collective bargaining under this section.

(6) No principal contractor, no employer for whom a principal contractor is authorized to bargain and no trade union or persons shall strike or lock out or cause a strike or lockout with respect to the negotiation of a collective agreement under this Division.

Persons bound by collective agreement

198 A collective agreement entered into between a principal contractor and a trade union under this Division is binding on

(a) the principal contractor in the principal contractor's capacity as the principal contractor,

(b) the principal contractor in the principal contractor's capacity as an employer to the extent that the principal contractor is an employer engaged in the designated project,

(c) the employers on whose behalf the principal contractor bargained collectively to the extent that they are employers engaged in the designated project,

(d) any other employer who becomes engaged in the designated project after the principal contractor and the trade union entered into a collective agreement, to the extent that the employer is an employer engaged in the designated project,

(e) the trade union, to the extent that the trade union is the bargaining agent for employees of the employers referred to in this section and to the extent that those employees are employed in the designated project, and

(f) the employees on whose behalf the trade union bargained collectively and who become part of the bargaining unit of the trade union, to the extent that the employees are employed in the designated project by the employers referred to in this section.

Signatures on and duration of collective agreement

199(1) If the terms and conditions of a collective agreement entered into between a principal contractor and a trade union under this Division have been settled, the principal contractor

and the trade union shall sign the collective agreement.

(2) If a collective agreement is entered into between a principal contractor and a trade union under this Division,

- (a) no employer on whose behalf the principal contractor bargained collectively,
- (b) no employer who becomes bound by the collective agreement after it is entered into, and
- (c) no employee on whose behalf a trade union bargained collectively or who becomes part of the bargaining unit of the trade union,

is required to sign the collective agreement.

(3) A collective agreement entered into between a principal contractor and a trade union under this Division is deemed

- (a) to be a collective agreement for the purposes of this Act, and
- (b) to continue in force until its expiry, the completion of the designated project or the repeal of the regulation under section 196, whichever first occurs.

(4) Section 130 does not apply to a collective agreement entered into between a principal contractor and a trade union under this Division.

(5) Notwithstanding subsection (3)(b), if the project occurs in phases, a collective agreement under this Division is deemed to continue in force with respect to any phase of construction until the completion of that phase of construction or the repeal of the regulation under section 196(1), whichever first occurs.

Effect of collective agreement

200(1) If a collective agreement is entered into between a principal contractor and a trade union under this Division,

- (a) the principal contractor, to the extent that the principal contractor is an employer engaged in the designated project,
- (b) the employers on whose behalf the principal contractor bargained collectively, to the extent that they are employers engaged in the designated project,
- (c) any other employer who becomes engaged in the designated project after the principal contractor and the trade union entered into a collective agreement, to the extent that the employer is an employer engaged in the designated project,
- (d) the trade union, to the extent that the trade union is the bargaining agent for employees of the employers referred to in this section and to the extent that those employees are employed in the designated project, and
- (e) the employees on whose behalf the trade union bargained collectively or who become part of the bargaining unit of the trade union, to the extent that the employees are employed in the designated project,

are during the currency of that collective agreement deemed to be excluded as provided in subsection (2).

(2) Where subsection (1) applies, the persons referred to in that subsection are during the currency of the collective agreement deemed to be excluded from

- (a) any registration certificate and the effects of any registration certificate,
- (b) any other collective agreement, and
- (c) if applicable, any application for a registration certificate, any registration certificate issued as a result of the application and any collective agreement entered into afterwards between a registered employers' organization and a trade union,

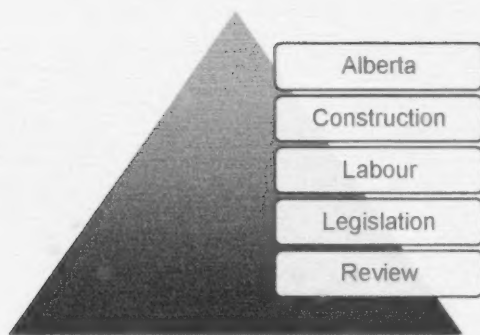
that, but for this Division, would have applied to them.

Application of other provisions of Act

201(1) If a collective agreement is entered into between a principal contractor and a trade union under this Division, section 40(3)(b), section 54(2)(b) and section 129 do not apply to

- (a) the principal contractor, employers, trade unions and employees referred to in and to the extent specified in section 200, or
- (b) the collective agreement between the principal contractor and the trade union.

(2) If a conflict arises between the provisions of this Division or the regulations under this Division and any other provisions of this Act, this Division or the regulations under this Division shall prevail.



Discussion Paper #2

Competitiveness Considerations

The broad purpose of this review is to consider *"changes to the construction industry provisions of the Labour Relations Code that may enhance the competitiveness and stability of labour relations within the industry"*. The scope of review includes:

The elements of Alberta legislation that may affect the competitiveness of Alberta's construction industry, with a view to maintaining and improving Alberta's preeminent position as a supplier of construction services with a stable construction labour relations environment.

This bulletin asks for input on the labour relations factors that may contribute to or detract from this competitiveness.

Submissions have been made that embrace, as their justification, their ability to enhance competitiveness. However, there is little uniformity over what is meant by the word. It is capable of different meanings for different people. Some focus on the competitiveness of the industry, others on competitiveness within the industry.

This paper asks for comment on what competitive factors should be considered in construction labour relations policy and on

the objective evidence available to support such considerations.

Global Competitiveness

At the highest level, the competitiveness of Alberta's construction industry involves the ability to attract owners and investors to build projects in Alberta. Alberta has a fortunate abundance of natural resources. However, the development of those resources depends upon businesses feeling optimistic and secure enough to invest their money here instead of elsewhere.

Investment alone is insufficient. Development requires an available and trained labour force equal to the challenge and scale of proposed projects. This includes employees at all levels; on the tools, in engineering and procurement, and in managerial positions.

Submissions are invited on how our labour relations policies, legislation, and practices help or hinder Alberta's competitive position.

Stability

Some express the view that legislation should be a changing environment and used as a competitiveness tool to attract business to the Province. Others suggest that too much legislative change adds uncertainty to the labour relations environment and may serve to foster unrest. In some jurisdictions important features of the labour relations system change with governments, sometimes with pronounced swings of the pendulum.

Alberta's construction industry labour relations framework has remained essentially unchanged since the late 1980's when the last substantial reforms were enacted. While there have been ups and downs in the economy, there have been few disputes that the system has not resolved. At the same time, within that framework, there have been significant shifts amongst the players in the industry. Many major projects have been completed successfully.

Labour relations are, by definition, activities that balance competing interests. Alterations in the governing legal framework can unquestionably alter the balance not only between labour and management but also between different unions and different contractors.

Comments are invited on the appropriate balance between legislative change and legislative stability. How should proposals for change be assessed in such an environment?

Work Disruptions

Alberta has had times when industrial unrest has been much more prevalent in construction than the more recent experience. The Labour Relations Code has a series of formal and informal mechanisms for achieving labour-management agreement without work stoppages. One is the Division 8 mechanism for major projects that was the subject of Discussion Paper #1. Another is the Registration system in general and more particularly the Consolidation Order – Construction Industry Dispute Resolution Tribunal process for registration bargaining.

Submissions are invited on the effectiveness of the provisions currently in place designed to minimize avoidable industrial unrest.

Submissions are also invited on the effectiveness of the current dispute resolution mechanisms in achieving appropriate economic and working condition adjustments between labour and management.

Some suggest that the current mix of bargaining relationships has itself created a form of competitive balance in the industry that has served to deter industrial action through the fear of a loss of market share. Comments on whether that is so or not are also invited.

Labour Supply

Submissions are invited on just how Alberta's labour supply situation is likely to unfold and what impact it can be expected to have on construction labour relations over the medium to long term. In particular, labour relations, and the competitive issues they raise, vary depending on whether labour is scarce or in oversupply.

A variety of legislation touches on labour supply; apprentice and training rules, occupational health and safety, labour mobility and foreign worker provisions and so on. While this review concerns the Labour Relations Code provisions, the mechanics of collective bargaining can influence these other programs and vice versa. For example, apprenticeship is influenced by bargained agreements, while the apprenticeship and trade certification rules have influenced bargaining unit configurations. Submissions are sought on the degree to which the Labour Relations Code provisions support or may be in conflict with other policies and programs that influence the quantity and quality of Alberta's labour supply.

There are a variety of economic projections forecasting the future for the Alberta construction industry and over the likelihood of future projects. In its 2012 Report, "Construction Looking Forward" the Construction Sector Council assessed Alberta's need for construction labour over the period 2012-2020. It looked at the current macro-economic and demographic scenario and the current inventory of major construction projects.

It suggests that in the near term, Alberta will need to attract back a significant number of out-of-province workers. Starting in 2015 the province's work force capacity will be tested as building construction is stacked on top of a new wave of major natural resource related projects. Particularly:

- Over the long-term, sustaining capital projects and shutdown/turnaround work will play a greater role, and place significant demands on labour supply as the

new facilities being built will need to be maintained.

- The ability of Alberta's construction industry to recruit the labour it needs depends on the mobility of key trades and on competing demands for other major resource-based projects across Canada.

The report predicts that Alberta's needs for construction workers will rise to 130,000 by 2020, surpassing the 2008 peak in 2016. This will be driven by activity not only in the oil sands but also in electrical utilities, transmission lines, pipelines and other forms of construction. It predicts some shifting demands for labour within the various trades.

Differing views have been expressed on the importance and role of trade unions, government, training facilities, and employers in recruiting and training Alberta's construction trade workforce. Differing views have also been expressed on the appropriate balance between developing a labour force within Alberta sufficient to meet anticipated demand and the use of recruitment from outside of Alberta to meet present and future needs. Objective evidence and comments on the influence of our construction labour relations legislation and system on these issues is invited.

Registration Bargaining

Any discussion of competition in Alberta's construction industry must include the Registration system of construction bargaining. That system has been in place, as an option for employers, for several decades. Registration allows employers, in a sector and trade division, to choose to bargain collectively with the trade unions representing those employees. It results in collective agreements binding those employers to common terms and conditions and wage rates.

Registration, by its nature, removes wages and benefits as a competitive element between employers bound by Registration. However, it also protects employers from

industrial action at times of vulnerability due to the ebbs and flows of construction work. Threats of "leap frogging" and "whipsawing" are minimized. Registration also provides for an orderly system of negotiations, occurring at common times, so that disputes in one trade do not customarily disrupt other trades.

Some observe that registration developed, for and is particularly directed at, those employers who have bargaining relationships with building trade unions, and not others. Current registrations only involve building trade unions, but the legislation still leaves the option open for employers with bargaining relationships with other unions. Such employers have not to this point chosen registration, but should the same competitive forces that gave rise to the existing registrations emerge between employers and other unions, that option might still prove viable.

No one has, to this point, suggested major changes to the registration system. Despite some suggestions for refinement, there appears to be a general consensus that it should remain a cornerstone of construction labour legislation.

One competitiveness concern raised over registration is whether it does, or should, allow a trade union that is a party to a registration agreement to enter into a different or partial agreement with one of the contractors with whom it has a bargaining relationship. Arguably this can have the effect of giving one contractor a competitive advantage over other contractors restricted by the registration agreement. This will be addressed in a subsequent discussion paper.

Certification or Union Displacement During a Construction Contract

Suggestions have been put forward that seek to protect construction contractors from any alteration in their job conditions or wages following certification by a union, whether the workforce was previously organized or not. Competing interests exist, between the job rates the employer may

have used to obtain the contract and the union's wish to obtain better terms and conditions for the employees it represents.

This is a controversial issue that raises issues of both principle and practicality. Comments are invited on any objective evidence to support such suggestions for change and on the practical issues they present given the lack of a requirement for union influence over the bidding process, the term of the contract, or the rates agreed upon, which under such proposals would be shielded from subsequent negotiation.

Competitiveness of Alberta Construction Businesses Outside Alberta

Alberta is not simply a consumer of construction services. Many Alberta based companies also sell their services outside of Alberta. While Alberta's labour laws for the construction industry are less influential in out-of-province work, they are not irrelevant where employers use the same core group of employees in several jurisdictions. They may also have some influence on how corporations view Alberta as a location of choice from which to undertake their activities. To some extent this may also be true in reverse when and if construction employers from outside Alberta procure work within the Province.

Competition for Construction Business from Outside of Alberta

Equally, construction contractors from outside Alberta compete for work within the province. Submissions are invited on any concerns over how the current construction labour legislation restrains or enhances competition from external construction providers.

Jurisdictional Disputes

Some raise the issue of jurisdictional disputes between unions as a source of uncompetitive pressure, making construction

more expensive than necessary. Others suggest that there has been a dramatic change in the way building trade unions handle issues of jurisdictional assignments both at the time of mark-up and if disputes arise. If this was an issue at one time, some suggest, it is no longer so.

Parties are invited to submit objective evidence of whether inter building trade union jurisdictional disputes, or similar disputes between affiliated and non-affiliated unions are a current concern.

Legal Challenges

Some have alluded to the legal challenges mounted to Alberta's labour legislation and, more particularly the legal and procedural issues surrounding Division 8 approvals, as having had a chilling effect on construction investment. The right to challenge decisions is fundamental to our system of law. However, care can be taken in drafting legislation to anticipate and seek to avoid uncertainty. Comment is sought on whether and to what extent this has been a significant factor and how this might best be addressed for the future.

Some Specific Questions

❖ *What competitive factors should be considered in construction labour relations policy, supported, where possible by objective evidence?*

❖ *How is the appropriate balance maintained between legislative change and legislative stability?*

❖ *Have the construction labour relations provisions struck an effective balance between achieving economic adjustments to terms and conditions of employment and*

avoiding unnecessary industrial unrest?

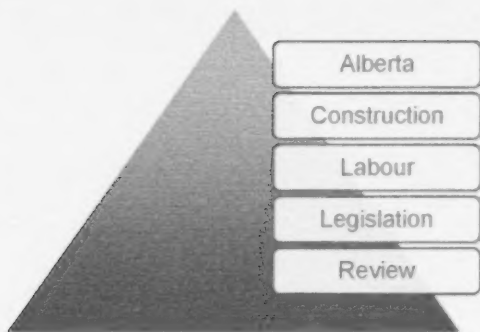
❖ Do the construction industry provisions in the Labour Relations Code support or conflict with policies touching on labour training, mobility or supply, along with any objective evidence available to support any proposals for change?

❖ Is there anything but the apparent broad support for the current construction registration system in essentially its present form?

❖ What legislative issues, if any, arise when Alberta firms compete outside Alberta, or firms from Alberta compete within the province?

❖ What changes, if any, should be made to allow contractors time to adopt to bargaining demands following new certification or the certification of that displaces an incumbent union. If any such changes were to be made what provisions would be necessary to protect against abuse?

❖ Are the current provisions dealing with judicial disputes adequate?



Discussion Paper #3

Construction Bargaining Unit Policies

The Labour Relations Board policy, to date, has been that applications for certification in the construction industry are to be made on a trade specific basis. This policy reflects the sectors and trade jurisdictions prescribed in the Code for Registration bargaining.

Proposals have been advanced before the Labour Relations Board, and to government in terms of legislative change, to facilitate industrial style "all employee units" in the construction industry.

Several justifications have been put forward for granting these "wall-to-wall" units. They would allow a Union to seek and hold bargaining rights for the various crafts employed by the employer based upon majority support amongst all the tradespersons employed.

Two applications to the LRB particularly raised these issues. They involved CLAC and JVD Installations Inc. and CEP and JVD Mill Services Inc. They stand adjourned pending this review.

Discussions with stakeholders so far indicate a wide variety of views on this issue, ranging from strong opposition to any departure

from the present policy, to proposals to allow "wall-to-wall" certification and to thereafter refuse anything but a wall-to-wall bargaining unit for that employer.

Construction industry legislation across Canada has some common themes but many nuances of difference arising from statutory language and board policies. Some guidance can be obtained by looking at the experiences in other jurisdictions on these questions, particularly Western Canada jurisdictions where many unions, employees, and employers active in Alberta also operate.

This bulletin is to solicit further views on the questions surrounding these construction industry bargaining unit issues.

The Labour Relations Board's Ongoing Role

This process is to review the construction industry provisions of the Labour Relations Code. The role of the Board is, and will continue to be, central to the administration of the Code.

The Code gives the Board the responsibility for determining appropriate bargaining unit descriptions, something necessary in many cases due to the wide variety of workplace circumstances. The Board also has the authority to establish suitable bargaining unit policies, as it has done in several industries including construction and near construction.

Legislation can be passed that influences Board policy or even defines bargaining units for certain industries. Legislation can also facilitate effective labour relations through bargaining structures and representation processes. However, it is not possible to legislate for every eventuality, so Board responsibility will presumptively remain the norm.

Present Labour Relations Board Policies

The Labour Relations Board policies are set out in detail in the Board's Information Bulletin #11 – Bargaining Units for the Building Trades (available on the Board's website at www.alrb.gov.ab.ca). That bulletin followed a 1990 review based on a discussion paper called "Bargaining Unit Policies for Construction and Construction Related Employment." It too is available on the Board's website.

The current policy reads:

The Board certifies employees on a trade-by-trade basis. This is because registration bargaining takes place this way. It is also because trade unions and many employees operate along craft lines. Employees within a craft share a community of interest. They share skills, working conditions, training and union benefit provisions.

It is also Board policy to certify construction and non-construction employees separately, and to certify by sector. Maintenance contractor employees are likewise certified on a trade-by-trade basis.

Barriers Caused by Present Policy?

Submissions are sought on what, if any, barriers to effective labour relations are caused by the present Board policy.

When the policy was last reviewed, the percentage of the construction work force represented by the traditional building trade unions was much higher than is the case today. There has been significant growth in representation by alternative and industrial style unions whose membership spans many or all trades. Some have bargained trade specific collective agreements and others "wall-to-wall" agreements.

Some argue that such significant growth within the current bargaining unit policies supports the view that the current policies present no real barrier to the various forms of representation and that no change is warranted. Others argue that there are nonetheless significant disadvantages to the present policy, particularly in relation to the organization of flexible work crews.

Parties are invited to bring forward objective evidence of any problems or barriers that may have been encountered with the present policies. Similarly parties are invited to address any potential adverse consequences should the policy change.

Bargaining Units Configuration – Representation Issues versus Bargaining Issues

Bargaining unit configurations in the construction industry serve several functions and influence labour relations processes in several ways.

The Labour Relations Code system for selecting a bargaining agent, and the parallel systems for revocation or replacement, works on majority support within a defined "constituency" called a bargaining unit. The "constituency boundaries" define which employees get to vote for or against representation. Defining these boundaries is the initial and primary function of the LRB's bargaining unit role and policies.

A second function relates to the structure of collective bargaining. However, that is not absolute for two reasons. First, the Labour Relations Code allows, subject to some restraints, voluntary recognition of a trade union. Second, even if a Union acquires bargaining rights on a trade-by-trade basis, outside of Registration, the Code does not prevent the parties subsequently negotiating a collective agreement that covers more than one, or perhaps all trades, again subject to some restraints.

A consequence of the bargaining unit policy, although not its purpose, is that it influences the open periods when employees may change or revoke a union's bargaining rights, or when another trade union may apply for certification. Outside of Registration bargaining, employers and trade unions, by setting the term of their contract, indirectly define the dates of open periods for the future. Similarly, the choice of parties, outside of Registration, to set their contract expiry dates affects the date

for any potential strike or lockout should they be unable to reach agreement.

Varying end dates, when more than one union is employed on a job site, creates the risk that one dispute could disrupt the work of other unions and contractors, something Registration avoids by setting common end dates.

In commenting on proposals for change, parties should distinguish between barriers caused by certification and bargaining unit policies and their preferences over bargaining structures. This is because, outside of Registration, parties have considerable freedom with how they bargain once bargaining agent status is established.

Should the Legislation Address Bargaining Units for the Construction Industry?

The Labour Relations Board, under the current legislation, has the power and responsibility to determine, under s. 12(3)(l) whether

"a group of employees in a unit appropriate for collective bargaining."

Unions applying for certification are free to apply for any configuration of bargaining unit, but under s. 34(1)(c), the Board must satisfy itself whether

"the unit applied for, or a unit reasonably similar to it, is an appropriate unit for collective bargaining."

While there are statutory rules for some public service employees and firefighters, almost all bargaining units are decided by the Board. In construction, however, this has been based on established policies like Information Bulletin 11, as well as Bulletins 9 and 10.

Despite the Board's clear discretion to decide on the appropriateness of any particular bargaining unit, the existing legislation has had a significant influence on the Board's policies. This is because any unit must be appropriate for collective

bargaining, and the legislation creates an elaborate system for construction industry bargaining under Registration. In particular, the Regulation specifies the sectors and trade jurisdictions for the purposes of Registration bargaining. That in turn influences the right to strike or lockout and any Construction Industry Dispute Resolution Tribunal Process.

Addressing bargaining units in legislation can create rigidity and inflexibility over time. If legislation were to be adopted should it set bargaining unit policies, create (or direct against) certain presumptive units subject to a discretion to vary, or simply leave such matters to ongoing Labour Board discretion?

If not the present policy, then what?

If the existing policy were to change, then it would be necessary to decide on certain new rules for bargaining unit configurations for the industry. The present policy addresses more than just the single craft – multi craft issue; it also restricts bargaining units to the sectors set by Regulation. Thus, separate certificates are granted for Roadbuilding, Pipeline, Specialty and General Construction. Further, separate certificates are granted for employees employed within construction and those employed outside of construction.

If, through legislation or Board policy, new options for bargaining unit configurations were to open up, what, if any of the existing restraints should be maintained:

- Restriction to construction work only?
- Restriction by sector?

The more there are potential units, the more opportunity there may be for argument as to which of those units may be appropriate for a particular workplace, and the greater the number of disputes likely to arise over qualifying numbers on certification applications. Can measures be adopted to minimize such disputes?

Views are solicited on what the effect of opening up further possible unit configurations might be, what any restrictions might be, how any disruptive

effect might be avoided, and whether the potential for any disruptive effect is outweighed by any advantages offered.

Community of Interest

The "appropriate for collective bargaining" test, absent some statutory influence, customarily focuses on whether the employees within the proposed unit share a sufficient community of interest.

The test is not simply "can bargaining take place". It is not simply what works best for this Employer. It involves balancing the interests of the employees involved, the views of any affected union and the Employer's interests. It also involves taking into account the wider provisions and interests within the Labour Relations Code, including the objectives set out in the Preamble.

Common training, qualifications and skill sets are important factors. Reliance on a hiring hall system, if one exists, may be important, along with the structure of the hiring hall and its integration into industry practice. Employee interests in particular types of benefit plans may be important including health, welfare, pension and similar plans.

Access to apprenticeship and training may be found important. Provincial rules over trade certification, apprenticeship and occupational health and safety may prove influential.

In the industrial setting, community of interest considerations generally do not vary much with the identity of the applicant trade union or the identity of the employer. In the construction industry, this is much less the case.

Employees who are members of a building trade union have a strong community of interest with other similarly placed members. They rely upon the hiring hall for work, and receive training and benefits through their Union affiliation. Those who are not members of a building trade union have less dependence upon and interest in maintaining those structures and benefits.

One Way or Two Way?

Proposals put forward would see the Board allow an application for certification of an "all construction employee" unit. A more difficult question is whether, if an all employee unit is granted, is it then possible for any Union, particularly a building trades union, but potentially any trade union, to thereafter apply for a trade specific unit.

Several employers have expressed the view that, once certified for an employee unit, no craft specific unit should be allowed for that Employer. Others, while advocating for all employee units, see no reason or ability to restrict subsequent craft units. However, if that occurred, it would result in one or more craft units, along with an "all employees less those crafts" for the remainder of the Employer's workforce, assuming they were already certified to another union for an all employee unit. This is sometimes expressed as a policy against the fragmentation of units.

This, in turn, raises the question of whether units somewhere between craft specific units and all employee units should be allowed and might themselves be appropriate for collective bargaining. The considerations may be different for general contractors and specialty trade contractors.

For the building trades, a system that allowed certification for an all employee unit, but then precluded craft units for that employer, would be a serious barrier to the ability to organize, since they are craft based. Some say this would only apply to a non-building trades employers; that is an employer not bound by Registration. However, that approach may be circular in that the objective of certification is that the employees, and not employers, have the freedom to choose or change their bargaining agent.

Submissions are invited addressing these issues and in particular how a system could co-exist allowing both wall-to-wall and craft based certification options. Submissions are equally invited over any practical difficulties this might entail, whether such difficulties

should preclude a wall-to-wall option, or how such difficulties might, in practice be overcome.

Trade Union Structures

The choice of whether to be represented by a trade union, and if so, which trade union, rests with the employees concerned. Trade unions come in a variety of forms. In North America, the traditional construction trade unions are based on craft lines, with each trade being represented by its own union and all or almost all being affiliated through the Building Trades Councils at the provincial, federal and North American levels.

Industrial unions have their roots, as the name implies, in industrial organization where, for a long time, trade based divisions have mostly given way to "all-employees" forms of organizing. In the first 40 of the 60 years or so since Canada adopted its current labour relations policies, construction employees almost exclusively chose the building trades unions to represent them and, by and large although not entirely, building trades engaged in limited organizing in the industrial sector. Bargaining unit policies influenced this because, even where trades persons were employed in mills or individual plants, union representation was determined by majority support in the entire unit.

One option that can be canvassed, along with the possibility of wall-to-wall units, is the option of amending the Labour Relations Code to more freely allow applications for certification by a group of trade unions acting together, perhaps in the form of a "Council of Trade Unions". Section 36 already provides some ability in this area.

Unions and Labour Supply

Labour relations in the construction industry is influenced significantly by the ability to supply experienced labour as well as by certification or revocation activities.

At the present and for the foreseeable future, projects will continue to face a

scarcity of construction employees in some trades.

Over the last decade, most of the growth in non-traditional building trade union representation has been through the so-called alternative unions, particularly in Alberta by the Christian Labour Association of Canada.

In looking forward, changes in the structure of Canadian unions cannot be ignored. Canada's industrial unions have gone through a period of rapid consolidation. Some of these unions have their origins in the separation of a Canadian component from a previously North American structure (for example the IWA or the CAW). One of the largest of the newly consolidated industrial unions – previously the CAW and CEP – soon to be known as Unifor – has indicated a wish to expand its activities in the construction industry.

Alberta's bargaining unit policies, whether Board developed or legislatively described will need to be sufficiently robust to deal fairly and efficiently in any changes in organizing patterns that come about in the future. Just as the last decade has brought about change, so perhaps will the next.

Submissions are solicited on the changes and challenges Alberta's construction industry will face in respect to organizing activities and how bargaining unit policies will or should influence that change.

Registration Provisions

Alberta's construction provisions provide Alberta employers with the option to seek Registration. This can apply beyond the traditional building trade unions if employers bargaining with other unions so choose.

Comments are invited on the impact any change in board policy may have on the Code's Registration provisions, whether viewed as positive or negative. This includes any impact of the current bargaining relationships and negotiating structures under existing registration, as well as the legislation itself in so far as it does

not at this point provide specifically for Registration covering "all-employee" units.

Experience in Other Jurisdictions

Some point to British Columbia as providing an example of where wall-to-wall units have been granted in the construction industry. This has been so since the 1988 decision in *Cicuto and Sons Contractors Ltd. et al and International Union of Operating Engineers, Local 115 et al* (B.C.L.R.B.), 1 C.L.R.B.R. (2d) 63. There are some significant differences between B.C.'s Accreditation option and Alberta's Registration Systems, both in legislative structure and in utilization.

B.C.'s Act deals specifically with craft based units in the following way:

21 (1) If one or more employees belong to a craft or group exercising technical or professional skills that distinguish it from the employees as a whole, and they are members of one trade union pertaining to the craft or skills, the trade union may, subject to sections 18, 19, 20, 24 and 25, apply to the board to be certified as the bargaining agent for the group if it is otherwise an appropriate bargaining unit.

(2) A trade union claiming to have as members in good standing a majority of the employees in a unit for which a craft or professional trade union is the bargaining agent under this section may apply to the board to have the unit included in another unit, and sections 18, 19, 20, 24 and 25 apply.

(3) If an application is not made under subsection (2), the employees in the unit for which a craft or professional trade union is the bargaining agent under this section must be excluded from another unit for the purpose of collective bargaining and must not be taken into account as members of another unit for purposes of this Code.

Section 41 of the B.C. Legislation also contemplates the certification of more formal

Councils of Trade Unions, and gives specific powers to the Labour Relations Board to establish how constituent members of such Councils negotiate and administer collective agreements in such circumstances.

Comment is invited on the utility and workability of the B.C. model in Alberta's construction industry, including the potential for joint applications, carve out craft certificates, and Councils of Trade Unions.

B.C. has had considerable experience in dealing with the many issues that can arise from having both all employee construction units and craft based units. Without any implication that the B.C. Model might be recommended, parties are invited to comment on any experiences they have had in that jurisdiction arising out of those issues and offer any useful comparative observations of the two systems.

Saskatchewan has just recently adopted legislation that also touches on construction bargaining units. Section 6-11(7) of Bill 85 provides, in respect to the Labour Relations Board's powers over bargaining units:

(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:

(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and

(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:

(i) the geographical jurisdiction of the union making the application; and

(ii) whether the certification order should be confined to a particular project.

While it is premature to evaluate the experience in Saskatchewan, parties are also invited to offer any relevant experiences

under either the former or the future Saskatchewan legislation.

Maintenance Contractor Bargaining Units

The Board's existing policy for maintenance contractors mandates trade-by-trade certification. This applies to those contractors who supply labour and expertise to maintain and repair industrial plants. They may be involved in long-term maintenance or shutdown maintenance.

There have been few issues raised about this industry. Unless objective evidence is brought forward of labour relations difficulties, it is presumed the policy will continue unchanged. Any party advocating for legislative change in this area should demonstrate why a legislative response is necessary, rather than leaving any such development to the Labour Relations Board to deal with if and when an issue arises.

Some Specific Questions

❖ *Should the current Labour Relations Board policy of trade and sector based certification in the Construction Industry remain the same or change to allow all construction employee units?*

❖ *If change is desirable, should that change take place through labour board policy or by legislation?*

❖ *If legislative change is desirable what form should that legislative change take?*

❖ *If legislation were recommended over appropriate construction bargaining units, should it leave discretion with the Board, provide legislation criteria for the Board, or establish rigid bargaining unit descriptions?*

❖ *What experiences on this topic from other jurisdictions with a similar legislation framework may be relevant to Alberta?*

❖ *What, if any, barriers to effective labour relations are caused by the present Board policies?*

❖ *What impediments to effective labour relations would arise if the present Board policy were altered?*

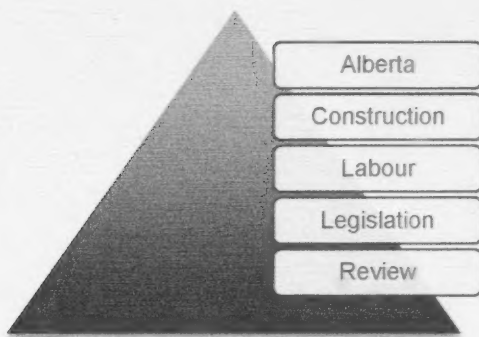
❖ *Should the policy of sector based bargaining units continue, and if not, why not?*

❖ *Should the policy of separate construction and non-construction units continue and, if not, why not?*

❖ *Should any changes distinguish between general contractors and specialty trade contractors?*

❖ *What impact might such changes have to existing Registration bargaining or to the adequacy of existing Registration Legislation?*

❖ *Is there any objective evidence of a need to change the existing policy in so far as it applies to maintenance units for tradespersons?*



Discussion Paper #4

Integrity of Registration plus Miscellaneous Topics

This is the last in this series of discussion papers. It covers several topics raised before or during this review. As with the earlier topics, comment is invited on whether there is a need for change, and if so, what any change should be. As before objective evidence; real life experiences that negate or support the need for change, would be particularly useful.

Registration Provisions

The cornerstone of Registration is s. 176(1) of the Code. It describes which employers are bound by a Registration Certificate and to what extent. Between 2008 and 2012, litigation proceeded from the Board to the Supreme Court of Canada. It involved alleged ambiguity within this core section, which reads:

Effect of registration

176 (1) On the issuance of a registration certificate, the employers' organization named in it becomes a registered employers' organization and has exclusive authority to bargain collectively with the group of trade unions named in the registration certificate on behalf of

(a) all employers actually or customarily engaged in the part of the construction industry set out in the registration certificate with whom any of the trade unions in the group of trade unions has established, or subsequently establishes, the right of collective bargaining, and

(b) any other employer actually or customarily engaged in the construction industry who is party to an agreement, notwithstanding anything in that agreement, that provides that the employer shall comply with any of the terms of a collective agreement entered into by any of the trade unions in the group of trade unions in respect of work in the part of the construction industry set out in the registration certificate, but only while that agreement to comply remains in force.

(2) Subsection (1) applies to employers only to the extent of their collective bargaining obligations with a trade union.

The CLRa trade division, as a Registered Employer's Organization, challenging the legality of an Employer and the Ironworkers, Local 720, negotiating directly with each other, and arriving at what purported to be an agreement, when the CLRa Trade Division felt it held exclusive bargaining rights for that Employer. The CLRa felt this purported agreement offered more favourable terms to this Employer than the Union was prepared to offer under the Registration negotiations, as a consequence of which other employers bound by Registration felt frozen out of available work.

The Employer and Local 720 asserted an ability to negotiate an agreement that recognized the Union, but only for certain terms of the Registration Agreement; sometimes referred to as "pick and choose" arrangement. The Board held that such negotiations and agreements contravened the exclusivity of the REO's right to bargain and were not allowed under Registration.

The Supreme Court of Canada upheld the Board ruling, but not before Alberta's Court of Appeal had said the Board had inadequately explained its rationale. Comment is invited on whether sections 176 or 178 should be amended in any way to reflect more clearly the Board's decision, or whether it should be left as it is, given the Supreme Court ruling. Alternatively, comment is invited on the circumstances in which an Employer might properly negotiate such an agreement and how it might be done without, in the process undermining the Registration scheme, and allowing one contractor to take the benefits of Registration without at the same time assuming the burdens imposed on other employers bound by the full Registration agreement.

Restrictions on Union Discipline

Joining a trade union is a contractual step that carries benefits and burdens. This is particularly for Unions that provide employment through a hiring hall, health, welfare, and pension plans, or training opportunities. Hiring halls offer work, but only if the union can attract offers of work through the contractors with whom it bargains. This, collectively, gives the union members an interest in acquiring union bargaining rights with construction contractors and in ensuring those contractors are supplied with employees who have the skills to perform the work in a competitive manner.

The potential burden of union membership is that an employee who violates its rules may be subject to charges under the union constitution. Most building trade constitutions provide that a union member can only work for a contractor with a union

bargaining relationship, unless the union consents to alternative employment.

The Labour Relations Code places unfair labour practice restrictions on when and how a union may enforce such rules against members. The member has a right to a fair hearing and to be represented by counsel, which the Court of Appeal, in *Armstrong*, held, means legal counsel. Another restriction, in s. 151(1)(ii) is that no union can discipline a member:

- (ii) for engaging in employment with an employer who is not a party to a collective agreement with the trade union if the trade union fails to make reasonable alternate employment available to that person within a reasonable time with an employer who is a party to a collective agreement with the trade union, unless the trade union and that person are participating in a strike that is permitted under this Act.

Other restrictions prevent the use of discriminatory rules or penalties.

The Board and subsequently the Alberta Court of Appeal considered s. 151(1)(ii) in *Armstrong v. Boilermakers Lodge 146* [2010] ABCA 326. The Court concluded that the Union could discipline a member for taking non-union managerial work and that the Union offered reasonable alternate employment considering the relative remuneration, length and stability of employment, and category of employment. The Court acknowledged the Union's point that "it does not preclude [the member] from pursuing a career in management; rather, it requires him to obtain prior approval in accordance with the union's constitution if he wishes to remain a member while pursuing that career".

Some view s. 151(1)(ii) as an inappropriate restraint on labour mobility. They view as inappropriate any union effort to enforce its rules on those who choose to work non-union but still remain as union members.

Others take the opposite view, saying that when an individual chooses to become and remain a member they take both the benefits and burdens. They ought not to be able to maintain the benefits while choosing to work non-union when union work is available.

This issue appears to be a subset of the broader and so-called "Right to Work" debate. The issue has been raised and comments on the point are invited, in both the broadest context, and in the narrower context of s. 151(1)(ii).

Build Up Principles

The Board decision in *Firestone Energy* [2009] Alta. LRBR made certain observations about the policy of not applying build-up principles to certification applications in the construction industry. The Board has since declined to re-examine its existing policy despite those comments. [see *Carpenters Local 1325 v. Keenan Hopkins et al*, 2010 CanLii 37280]

Some parties urge legislative change to ensure that the Board does not change existing policy in the future. Others express concern that the policy is subject to abuse, with too many certifications based on a very small and, in the submission of some, unrepresentative and sometimes contrived, groups of employees. Further concern has been expressed that, should all employee certification come about, any group of two or more employees could effectively decide the representation rights of an anticipated far larger work force, allowing employees from as few as one trade to predetermine the representation rights of all trades ultimately employed by that contractor.

Submissions are invited on the question of whether any legislative steps should be taken to give statutory force to the no build-up principle, to modify that principle, or to control any potential for abuse. Again, objective evidence to support submissions made would be welcome.

Open Periods in Construction

The Board decision in *Firestone Energy* [2009] Alta. LRBR held that parties cannot, by the early renewal of their collective agreement, close off the open period provided for in s. 37 of the Labour Relations Code for certification or s. 52 for revocation. The decision was controversial, was upheld on judicial review, but is still subject to an appeal to the Court of Appeal.

The early renewal of a collective agreement affects not only representation rights; it can also sometimes affect the incumbent union's own right to seek changes to the agreement by giving a notice to bargain in the window period created by s. 59(2) of the Code. In the past, some agreements have included automatic renewal clauses that purport to renew an agreement before the statutory negotiation period, if no earlier notice to bargain is given.

Open periods and collective agreement end dates are particularly important on construction sites because a work stoppage by one union can disrupt the work of the entire site, even without picketing. With the advent of more managed open sites, some argue that change is needed and that Section 183 ought to apply all construction agreements, whether under Registration or not. It reads:

Expiry of collective agreement

183 Subject to section 130, a collective agreement entered into by a party to whom this Part applies shall provide for the expiry of the agreement on April 30 calculated biennially from April 30, 1989.

The Board decision in *Westbrook Electric* [1991] ALRBR 56 interpreted this section as limited to Registration Agreements. If amended to include all construction agreements, it could provide uniform open periods for all construction work. Submissions are invited on the desirability of such uniform open periods. Submissions are also invited on whether the

window periods for organizing, revocation, and giving notice to bargain should indeed be considered to be matters of public policy and not subject to being closed off by the early renewal of the collective agreement.

Alternatively, should parties be free to close off these open periods, and if so, should that be subject to Labour Board approval or pre-conditions to protect employee representation and negotiation rights as it is in some other Provinces? If so, what should those preconditions be?

Effect of Certification Under Registration

The construction industry is competitive and much of the work within construction is awarded on the basis of tendering processes. Wage rates are one, but by no means the only element, that goes into a competitive bid. Certification outside of Registration leads to a period of free collective bargaining. Under Registration, an Employer is immediately and automatically bound by the Registration agreement as a result of s. 178(a) of the Code.

The Competition Construction Coalition has argued that:

When a company has secured work under certain economic assumptions, a newly imposed collective agreement can place the company in economic jeopardy and place jobs at risk. Again, to account for this risk, the contractor can include a contingency in the cost that it offers to an owner. However, this simply increases the costs to the owner of developing a project.

To provide greater economic certainty to contractors, contractors that are newly certified with a building trade union and have not had an opportunity to influence the registration collective agreement should be able to complete all work successfully bid prior to the

certification under the terms and conditions that existed prior to the certification coming into effect. In this way, the company would not face economic jeopardy as a result of the change and could adjust future bidding to reflect the new agreement terms.

The Building Trade Unions advance several reasons for opposing such a concept. First, they say voluntary relief has been offered in deserving cases since the unions have no interest in an employer going out of business. However, they concede this is often in exchange for not opposing the certification application. Some argue that contractors in any event know the prevailing wage rates, and if they bid below these rates they know they face the twin perils of being unable to obtain skilled labour and of attracting a certification application. Some argue that, given the prevalence of corporate arrangements aimed at "raid proofing" in the industry, this would simply be an invitation to structure one's contractual affairs so that no advantage could ever be obtained through certification.

Submissions are invited on this issue along with workable suggestions from those advocating change as to how any change might be made in a way that addresses the potential for abuse.

Appointments to the Alberta Labour Relations Board

In its submission to Government in June 2011, the Construction Competitiveness Coalition expressed concerns about the appointment process for Chairs, Vice-Chairs and Members of the Labour Relations Board. It suggested that:

"Additional stakeholder consultation is required for appointing or reappointing the Chair or a Vice-Chair of the LRB to ensure that the most appropriate candidates – those who are capable and willing to issue

decisions that reflect the legislature's policy intention – are considered and ultimately appointed."

A similar criticism is offered of member appointments, with the suggestion that some Union side board members have been allowed to "veto the appointment of [their] competition regardless of whether the candidate is qualified for the position". This, it is said, is preventing the appointment of candidates who have the required qualifications ... but may not share a particular union agenda or philosophy."

Consultation so far suggests that strong views exist that the Labour Relations Board has indeed become subject to the push and pull of political or ideological agendas, but those allegations are directed, with equal vigor, towards some on the management side, or those perceived to have an outlook antithetical to the right to organize.

Any politicization of the Labour Relations Board runs the risk of diminishing its reputation as a neutral quasi-judicial body. One side effect of this has been an increasing reluctance to have construction members sit on construction disputes, which may give a superficial appearance of distance, but at the expense of industrial expertise.

Another side effect, commented upon by some, has been an increased willingness to criticize board decisions in a more personalized way that has been the case in the past, and sometimes in ways that would be considered inappropriate in other judicial or quasi-judicial contexts.

Comment is invited on these topics insofar as they affect the construction industry. However, the invitation is extended with the caution that, from any party, the argument that "appointments should be more neutral in my favour", runs the risk of self-contradiction.

Some Specific Questions

❖ *What competitive factors should be considered in construction labour relations policy, supported, where possible by objective evidence?*

❖ *How is the appropriate balance maintained between legislative change and legislative stability?*

❖ *Have the construction labour relations provisions struck an effective balance between achieving economic adjustments to terms and conditions of employment and avoiding unnecessary industrial unrest?*

❖ *Do the construction industry provisions in the Labour Relations Code support or conflict with policies touching on labour training, mobility or supply, along with any objective evidence available to support any proposals for change?*

❖ *Is there anything but the apparent broad support for the current construction registration system in essentially its present form?*

❖ *What legislative issues, if any, arise when Alberta firms compete outside Alberta, or firms from Alberta compete within the province?*

❖ *What changes, if any, should be made to allow contractors time to adopt to bargaining demands following new certification or the certification of that displaces an incumbent union. If any such changes were to be*

made what provisions would be necessary to protect against abuse?

❖ *Are the current provisions dealing with judicial disputes adequate?*

Written Submissions Received

Bulletin 1

1. International Union of Bricklayers and Allied Craft Workers
2. Construction Maintenance and Allied Workers
3. International Brotherhood of Electrical Workers, Local 424 and United Association Local 496 from McGown Johnson
4. Plasterers and Cement Masons Union Local 222
5. International Association of Heat & Frost Insulators & Allied Workers
6. Sheet Metal Worker's International Association, Local Union No. 8
7. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 488
8. Construction Competitiveness Alliance
9. International Union of Painters & Allied Trades Local 177
10. Merit Contractors Association
11. Construction and General Workers Union, Local 92
12. Alberta and Northwest Territories Regional Council of Carpenters and Allied Workers
13. Building Trades of Alberta
14. General Presidents' Maintenance Committee for Canada
15. Progressive Contractors Association of Canada
16. Christian Labour Association of Canada
17. Canadian Natural Resources Ltd.
18. Construction Competitiveness Coalition from McLennan Ross
19. Alberta Roadbuilders & Heavy Construction Association

Bulletin 2

1. International Brotherhood of Electrical Workers, Local 424
2. Alberta Regional Council of Carpenters and Allied Workers
3. Plasterers and Cement Masons Union Local 222
4. International Association of Heat & Frost Insulators & Allied Workers
5. International Union of Bricklayers and Allied Craftworkers
6. International Union of Painters & Allied Trades Local 177
7. Building Trades of Alberta
8. Sheet Metal Worker's International Association, Local 8
9. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers
10. Canadian Piping Trades Local 488
11. General Presidents' Maintenance Committee for Canada
12. Construction and General Workers Union, Local 92
13. Progressive Contractors Association of Canada
14. Construction Competitiveness Alliance
15. Construction Competitiveness Coalition from Andrew Wallace, PCL Constructors Inc.
16. Canada's Building Trades Unions
17. Merit Contractors Association
18. Suncor Energy Inc.

Bulletin 3

1. International Brotherhood of Electrical Workers, Local 424 and United Association, Local 496 from William Johnson, Q.C.
2. Murray McGown, Q.C.
3. International Brotherhood of Electrical Workers, Local 424
4. Ledcor Contractors Ltd.
5. Construction Competitiveness Alliance
6. International Union of Painters & Allied Trades Local 177
7. Building Trades of Alberta
8. Operative Plasters' and Cement Masons' International Association of the United States and Canada, Local 222
9. International Association of Heat & Frost Insulators & Allied Workers Local 110
10. Sheet Metal Workers' International Association, Local Union No. 8
11. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 488
12. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local Union 720
13. Alberta Regional Council of Carpenters and Allied Workers
14. Construction Competitiveness Coalition
15. Building and Construction Trades Department
16. International Union of Bricklayers and Allied Craftworkers, Local No. 1
17. Christian Labour Association of Canada
18. Suncor Energy Inc.
19. General Presidents' Maintenance Committee for Canada and the National Maintenance Council for Canada

Bulletin 4

1. Construction Competitiveness Coalition
2. International Brotherhood of Electrical Workers, Local 424
3. Construction Labour Relations an Alberta association
4. Construction and General Workers Union, Local No. 92
5. General Presidents' Maintenance Committee for Canada
6. Unifor
7. Building Trades of Alberta
8. International Association Of Heat & Frost Insulators & Allied Workers Local 110
9. International Union of Painters & Allied Trades Local 177
10. Sheet Metal Workers' International Association Local Union No. 8
11. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 488
12. International Brotherhood of Electrical Workers, Local 424 and United Association Local 496 from McGown Johnson
13. Alberta Regional Council of Carpenters and Allied Workers

14. Christian Labour Association of Canada
15. Plasterers and Cement Masons Union, Local 222
16. Ledcor Contractors Ltd.
17. Construction Competitiveness Alliance
18. International Union of Bricklayers and Allied Craft Workers, Local No. 1
19. Canada's Building Trades Unions
20. Unifor, from Daniel Rogers
21. General Teamsters, Local Union No. 362